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A TREATISE

ON THE

PRACTICE OF THE COURTS

OF THE

STATE OF CALIFORNIA,

CAREFULLY ADAPTED TO THE

EXISTING LAW.

BY

J. B. HART, Esq.

OF THE SAN FRANCISCO BAR.

NEW YORK:

BANKS, GOULD & CO., 144 NASSAU STREET.

ALBANY:

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CONSTITUTION

OF THE

UNITED STATES.

PREAMBLE.

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

ARTICLE I.

OF THE LEGISLATIVE POWER.

Section 1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

OF THE HOUSE OF REPRESENTATIVES.

Section 2. The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant in that state in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and, until such enumeration shall be made, the state of New Hampshire shall be entiled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The house of representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

OF THE SENATE.

SECTION 3. The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of

the United States, and who shall not, when elected, be an inhabitant of that state for which he was chosen.

The vice-president of the United States shall be president of the senate, but shall have no vote unless they be equally divided.

The senate shall choose their other officers, and have a president *pro tempore*, in the absence of the vice-president, or when he shall exercise the office of president of the United States.

The senate shall have the sole power to try all impeachments: When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside: And no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment is cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

MANNER OF ELECTING MEMBERS.

SECTION 4. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the congress may at any time, by law, make or alter such regulations, except as to places of choosing senators.

CONGRESS TO ASSEMBLE ANNUALLY.

The congress shall assemble at least once in the year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

POWERS.

SECTION 5. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secresy; and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal.

Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

COMPENSATION, &C., OF MEMBERS.

SECTION 6. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during that time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.

MANNER OF PASSING BILLS, &C.

SECTION 7. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to re-consider it. If, after such re-consideration, two

thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be considered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment,) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be re-passed by two thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

POWER OF CONGRESS.

SECTION 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform rules on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;—And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

LIMITATION OF THE POWERS OF CONGRESS.

SECTION 9. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto law shall be passed.

No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

LIMITATION OF THE POWERS OF THE INDIVIDUAL STATES.

SECTION 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and repisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.

No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war, in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

EXECUTIVE POWER.

SECTION 1. The executive power shall be vested in a president of the United States of America. He shall hold his

office during the term of four years, and together with the vice-president, chosen for the same term, be elected as follows:

MANNER OF ELECTING.

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant with the same state as themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representative, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose by ballot one of them for president; and if no person have a majority, then from the five highest on the list the said house shall in like manner choose the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members, from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them, by ballot, the vice-president.]

TIME OF CHOOSING ELECTORS.

The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

WHO ELIGIBLE.

No person, except a natural born citizen, or a citizen of the United States, at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, and been fourteen years a resident within the United States.

WHEN THE PRESIDENT'S POWER DEVOLVES ON THE VICE-PRESIDENT.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

PRESIDENT'S COMPENSATION.

The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

OATH.

Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States."

POWER AND DUTIES.

SECTION 2. The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of

the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. He shall, from time to time, give to the congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

OFFICERS REMOVED.

SECTION 4. The president, vice-president, and all civil officers of the United States, shall be removed from office, on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

OF THE JUDICIARY.

SECTION 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts

as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

JURISDICTION OF SUPREME COURT.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.

OF TRIALS FOR CRIMES.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

OF TREASON.

SECTION 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.

No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

STATE ACTS.

SECTION 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

PRIVILEGES OF CITIZENS.

SECTION 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

RUNAWAYS TO BE DELIVERED UP.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

NEW STATES.

SECTION 3. New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the congress.

TERRITORIAL AND OTHER PROPERTY.

The congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

SECTION 4. The United States shall guarantee to every state in this Union, a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence.

ARTICLE V.

AMENDMENTS.

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by convention in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; provided that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

DEBTS.

All debts contracted, and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation.

SUPREME LAW OF THE LAND.

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution, or laws of any state, to the contrary notwithstanding.

OATH.—NO RELIGIOUS TEST.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound, by oath or affirmation, to support this constitution: but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Done in convention by the unanimons consent of the states present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

GEO. WASHINGTON,
President and Deputy from Virginia.

NEW HAMPSHIRE.

John Langdon,
Nicholas Gilman.

MASSACHUSETTS.

Nathaniel Gorham,
Rufus King.

CONNECTICUT.

William Samuel Johnson,
Roger Sherman.

DELAWARE.

George Reed,
Gunning Bedford, jr.,
John Dickinson,
Richard Bassett,
Jacob Broom.

MARYLAND.

James M'Henry,
Daniel of St. Tho. Jenifer,
Daniel Carroll.

NEW YORK.

Alexander Hamilton.

NEW JERSEY.

William Livingston,
David Brearley,
William Paterson,
Jonathan Dayton.

PENNSYLVANIA.

Benjamin Franklin,
Thomas Mifflin,
Robert Morris,
George Clymer,
Thomas Fitzsimons,
Jared Ingersoll,
James Wilson,
Gouverneur Morris.

VIRGINIA.

John Blair,
James Madison, jr.

NORTH CAROLINA.

William Blount,
Richard Dobbs Spaight,
Hugh Williamson.

SOUTH CAROLINA.

John Rutledge,
Charles C. Pinckney,
Charles Pinckney,
Pierce Butler.

GEORGIA.

William Few,
Abraham Baldwin.

Attest: WILLIAM JACKSON, *Secretary.*

AMENDMENTS

TO THE

CONSTITUTION OF THE UNITED STATES, RATIFIED ACCORDING TO THE PROVISIONS OF THE FIFTH ARTICLE OF THE FOREGOING CONSTITUTION.

FREE EXERCISE OF RELIGION, &c.

ARTICLE THE FIRST. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

RIGHT TO BEAR ARMS.

ARTICLE THE SECOND. A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

NO SOLDIER TO BE BILLETED, &c.

ARTICLE THE THIRD. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

UNREASONABLE SEARCHES PROHIBITED.

ARTICLE THE FOURTH. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CRIMINAL PROCEEDINGS.

ARTICLE THE FIFTH. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

MODE OF TRIAL.

ARTICLE THE SIXTH. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

RIGHT OF TRIAL BY JURY.

ARTICLE THE SEVENTH. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

BAIL, FINES.

ARTICLE THE EIGHTH. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

RIGHTS NOT ENUMERATED.

ARTICLE THE NINTH. The enumeration in the constitution

of certain rights, shall not be construed to deny or disparage others retained by the people.

POWERS RESERVED.

ARTICLE THE TENTH. The powers not delegated to the United States, by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

[The following amendment was proposed at the second session of the third congress. It is printed in the laws of the United States, 1st vol., p. 73, as Article XI.

LIMITATION OF JUDICIAL POWER.

ARTICLE THE ELEVENTH. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

[The three following sections were proposed as amendments at the first session of the eighth congress. They are printed in the laws of the United States as Article XII.]

ELECTION OF PRESIDENT.

ARTICLE THE TWELFTH. The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each,—which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for president, shall be the president, if such a number be a majority of the whole number of electors appointed; and if no person have such a majority, then from the persons having the highest numbers, not ex-

ceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States.

NOTE.—Another amendment was proposed as Article xiii., at the second session of the eleventh congress, but not having been ratified by a sufficient number of states, has not yet become valid as a part of the constitution of the United States. It is erroneously given as a part of the constitution, in page 74, vol. i., laws of the United States.

TREATY OF PEACE, FRIENDSHIP, LIMITS, AND SETTLEMENT,

BETWEEN THE UNITED STATES OF AMERICA AND THE MEXICAN REPUBLIC.

DATED AT GUADALUPE HIDALGO, 2d February, 1848.
EXCHANGED AT QUERETARO, 30th May, 1848.
RATIFIED BY THE PRESIDENT U. S., 16th March, 1848.
PROCLAIMED BY THE PRESIDENT U. S., 4th July, 1848.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

WHEREAS a treaty of peace, friendship, limits, and settlement, between the United States of America and the Mexican Republic, was concluded and signed at the city of Guadalupe Hidalgo, on the the second day of February, one thousand eight hundred and forty-eight, which treaty, as amended by the senate of the United States, and being in the English and Spanish languages, is word for word as follows:

In the name of Almighty God:

The United States of America and the United Mexican States, animated by a sincere desire to put an end to the calamities of the war which unhappily exists between the two republics, and to establish upon a solid basis relations of peace and friendship, which shall confer reciprocal benefits upon the citizens of both, and assure the concord, harmony, and mutual confidence wherein the two people should live, as good neighbors, have for that purpose appointed their respective plenipotentiaries—that is to say, the president of the

United States has appointed Nicholas P. Trist, a citizen of the United States; and the president of the Mexican Republic has appointed Don Luis Gonzaga Cuevas, Don Bernardo Couto, and Don Miguel Atristain, citizens of the said republic, who, after a reciprocal communication of their respective full powers, have, under the protection of Almighty God, the author of peace, arranged, agreed upon, and signed the following

Treaty of Peace, Friendship, Limits, and Settlement, between the United States of America and the Mexican Republic.

ARTICLE I.

There shall be firm and universal peace between the United States of America and the Mexican Republic, and between their respective countries, territories, cities, towns, and people, without exception of places or persons.

ARTICLE II.

Immediately upon the signature of this treaty, a convention shall be entered into between a commissioner or commissioners appointed by the general-in-chief of the forces of the United States, and such as may be appointed by the Mexican government, to the end that a provisional suspension of hostilities shall take place, and that, in the places occupied by the said forces, constitutional order may be re-established, as regards the political, administrative, and judicial branches, so far as this shall be permitted by the circumstances of military occupation.

ARTICLE III.

Immediately upon the ratification of the present treaty by the government of the United States, orders shall be transmitted to the commanders of their land and naval forces, requiring the latter (provided this treaty shall then have been ratified by the government of the Mexican Republic, and the ratifications exchanged) immediately to desist from blockading any Mexican ports; and requiring the former (under the same condition) to commence, at the earliest moment practicable, withdrawing all troops of the United States then in the interior of the Mexican Republic, to points that shall be selected by common agreement, at a distance

from the seaports, not exceeding thirty leagues; and such evacuation of the interior of the republic shall be completed with the least possible delay; the Mexican government hereby binding itself to afford every facility in its power for rendering the same convenient to the troops, on their march and in their new positions, and for promoting a good understanding between them and the inhabitants. In like manner, orders shall be despatched to the persons in charge of the custom-houses at all ports occupied by the forces of the United States, requiring them (under the same condition) immediately to deliver possession of the same to the persons authorized by the Mexican government to receive it, together with all bonds and evidences of debt for duties on importations and on exportations, not yet fallen due. Moreover, a faithful and exact account shall be made out, showing the entire amount of all duties on imports and on exports, collected at such custom-houses, or elsewhere in Mexico, by authority of the United States, from and after the day of the ratification of this treaty by the government of the Mexican Republic; and also an account of the cost of collection; and such entire amount, deducting only the cost of collection, shall be delivered to the Mexican government, at the city of Mexico, within three months after the exchange of ratifications.

The evacuation of the capital of the Mexican Republic by the troops of the United States, in virtue of the above stipulation, shall be completed in one month after the orders there stipulated for shall have been received by the commander of said troops, or sooner if possible.

ARTICLE IV.

Immediately after the exchange of ratifications of the present Treaty, all castles, forts, territories, places, and possessions, which have been taken or occupied by the forces of the United States during the present war, within the limits of the Mexican Republic, as about to be established by the following article, shall be definitely restored to the said Republic, together with all the artillery, arms, apparatus of war, munitions, and other public property, which were in the said castles and forts when captured, and which shall remain there at the time when this treaty shall be duly ratified by the government of the Mexican Republic. To this end, immediately upon the signature of this treaty, orders shall be dispatched to the American officers commanding such castles and forts, securing against the removal

or destruction of any such artillery, arms, apparatus of war, munitions, or other public property. The city of Mexico, within the inner line of entrenchments surrounding the said city, is comprehended in the above stipulations, as regards the restoration of artillery, apparatus of war, &c.

The final evacuation of the territory of the Mexican Republic, by the forces of the United States, shall be completed in three months from the said exchange of ratifications, or sooner if possible: the Mexican government hereby engaging, as in the foregoing article, to use all means in its power for facilitating such evacuation, and rendering it convenient to the troops, and for promoting a good understanding between them and the inhabitants.

If, however, the ratification of this treaty by both parties should not take place in time to allow the embarcation of the troops of the United States to be completed before the commencement of the sickly season, at the Mexican ports on the Gulf of Mexico, in such case a friendly arrangement shall be entered into between the general-in-chief of the said troops and the Mexican government, whereby healthy and otherwise suitable places, at a distance from the ports not exceeding thirty leagues, shall be designated for the residence of such troops as may not yet have embarked, until the return of the healthy season. And the space of time here referred to as comprehending the sickly season, shall be understood to extend from the first day of May to the first day of November.

All prisoners of war taken on either side, on land or on sea, shall be restored as soon as practicable after the exchange of ratifications of this treaty. It is also agreed that if any Mexicans should now be held as captives by any savage tribe within the limits of the United States, as about to be established by the following article, the government of the said United States will exact the release of such captives, and cause them to be restored to their country.

ARTICLE V.

The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New

Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called *Paso*) to its western termination; thence, northward, along the western line of New Mexico, until it intersects the first branch of the river Gila (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same); thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

The southern and western limits of New Mexico, mentioned in this article, are those laid down in the map entitled "Map of the United Mexican States, as organized and defined by various Acts of the Congress of said republic, and constructed according to the best authorities. Revised edition. Published at New York, in 1847, by J. Disturnell." Of which map a copy is added to this treaty, bearing the signatures and seals of the undersigned plenipotentiaries. And, in order to preclude all difficulty in tracing upon the ground the limit separating Upper from Lower California, it is agreed that the said limit shall consist of a straight line drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point on the coast of the Pacific Ocean, distant one marine league due south of the southernmost point of the port of San Diego, according to the plan of said port made in the year 1782, by Don Juan Pantoja, second sailing master of the Spanish fleet, and published at Madrid in the year 1802, in the Atlas to the voyage of the shooners *Sutil* and *Mexicana*, of which plan a copy is hereunto added, signed and sealed by the respective plenipotentiaries.

In order to designate the boundary line with due precision, upon authoritative maps, and to establish upon the ground landmarks which shall show the limits of both republics, as described in the present article, the two governments shall each appoint a commissioner and a surveyor, who, before the expiration of one year from the date of the exchange of ratifications of this treaty, shall meet at the port of San Diego, and proceed to run and mark the said boundary in its whole course to the mouth of the Rio Bravo del Norte. They shall keep journals and make out plans of their operations; and the result agreed upon by them shall be deemed a part of this treaty, and shall have the same force as if it were inserted therein. The two governments will amicably agree regarding what may be necessary to these persons, and also as to their respective escorts, should such be necessary.

The boundary line established by this article shall be religiously respected by each of the two republics, and no change shall ever be made therein, except by the express and free consent of both nations, lawfully given by the general government of each, in conformity with its own constitution.

ARTICLE VI.

The vessels and citizens of the United States shall, in all time, have a free and uninterrupted passage by the Gulf of California, and by the river Colorado below its confluence with the Gila, to and from their possessions situated north of the boundary line defined in the preceeding article; it being understood that this passage is to be by navigating the Gulf of California and the river Colorado, and not by land, without the express consent of the Mexican government.

If, by the examinations which may be made, it should be ascertained to be practicable and advantageous to construct a road, canal, or railway, which should in whole or part run upon the river Gila, or upon its right or its left bank, within the space of one marine league from either margin of the river, the governments of both republics will form an agreement regarding its construction, in order that it may serve equally for the use and advantage of both countries.

ARTICLE VII.

The river Gila, and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico, being, agreeably to the fifth article, divided in the middle between the two republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making the said rivers navigable, or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both governments.

The stipulations contained in the present article shall not impair the territorial rights of either republic within its established limits.

ARTICLE VIII.

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy, with respect to it, guarantees equally ample as if the same belonged to citizens of the United States.

ARTICLE IX.

The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, comformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

ARTICLE X.

[Stricken out.]

ARTICLE XI.

Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the government of the United States, and whose incursions within the territory of Mexico would be prejucial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the government of the United States whensoever this may be necessary; and that when they cannot be prevented, they shall be punished by the said government, and satisfaction for the same shall be exacted—all in the same way, and with equal dilligence and energy, as if the same incursions were meditated or committed within its own territory against its own citizens.

It shall not be lawful, under any pretext whatever, for any inhabitant of the United States to purchase or acquire any Mexican, or any foreigner residing in Mexico, who may have been captured by Indians inhabiting the territory of either of the two republics, nor to purchase or acquire horses, mules, cattle, or property of any kind, stolen within Mexican territory by such Indians.

And in the event of any person or persons, captured within Mexican territory by Indians, being carried into the territory of the United States, the government of the latter engages and binds itself, in the most solemn manner, so soon as it shall know of such captives being within its territory, and shall be able so to do, through the faithful exercise of its influence and power, to rescue them, and return them to their country, or deliver them to the agent or representative of the Mexican government. The Mexican authorities will, as far as practicable, give to the government of the United States notice of such captures; and its agent shall pay the expenses incurred in the maintenance and transmission of the rescued captives; who, in the meantime, shall be treated with the utmost hospitality by the American authorities at the place where they may be. But if the government of the United States, before receiving such notice from Mexico, should obtain intelligence, through any other channel, of the existence of Mexican captives within its territory, it will

proceed forthwith to effect their release and delivery to the Mexican agent as above stipulated.

For the purpose of giving to these stipulations the fullest possible efficacy, thereby affording the security of redress demanded by their true spirit and intent, the government of the United States will now and hereafter pass, without unnecessary delay, and always vigilently enforce, such laws as the nature of the subject may require. And finally, the sacredness of this obligation shall never be lost sight of by the said government when providing for the removal of the Indians from any portion of the said territories, or for its being settled by citizens of the United States; but on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.

ARTICLE XII.

In consideration of the extension acquired by the boundaries of the United States, as defined in the fifth article of the present treaty, the government of the United States engages to pay to that of the Mexican republic the sum of fifteen millions of dollars.

Immediately after this treaty shall have been duly ratified by the government of the Mexican republic, the sum of three millions of dollars shall be paid to the said government by that of the United States, at the city of Mexico, in the gold or silver coin of Mexico. The remaining twelve millions of dollars shall be paid at the same place, and in the same coin, in annual instalments of three millions of dollars each, together with interest on the same at the rate of six per centum per annum. This interest shall begin to run upon the whole sum of twelve millions from the day of the ratification of the present treaty by the Mexican government, and the first of the instalments shall be paid at the expiration of one year from the same day. Together with each annual instalment, as it falls due, the whole interest accruing on such instalment from the beginning shall also be paid.

ARTICLE XIII.

The United States engage, moreover, to assume and pay to the claimants all the amounts now due them, and those

hereafter to become due, by reason of the claims already liquidated, and decided against the Mexican republic, under the conventions between the two republics severally concluded on the eleventh day of April, eighteen hundred and thirty-nine, and on the thirtieth day of January, eighteen hundred and forty-three: so that the Mexican republic shall be absolutely exempt for the future from all expense whatever on account of the said claims.

ARTICLE XIV.

The United States do furthermore discharge the Mexican republic from all claims of citizens of the United States, not heretofore decided against the Mexican government, which may have arisen previously to the date of the signature of this treaty; which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the board of commissioners provided for in the following article, and whatever shall be the total amount of those allowed.

ARTICLE XV.

The United States, exonerating Mexico from all demands on account of the claims of their citizens mentioned in the preceding article, and considering them entirely and forever cancelled, whatever their amount may be, undertake to make satisfaction for the same, to an amount not exceeding three and one quarter millions of dollars. To ascertain the validity and amount of those claims, a board of commissioners shall be established by the government of the United States, whose awards shall be final and conclusive: provided that in deciding upon the validity of each claim, the board shall be guided and governed by the principles and rules of decision prescribed by the first and fifth articles of the unratified convention, concluded at the city of Mexico on the twentieth day of November, one thousand eight hundred and forty-three; and in no case shall an award be made in favor of any claim not embraced by these principles and rules.

If, in the opinion of the said board of commissioners, or of the claimants, any books, records, or documents in the possession or power of the government of the Mexican republic, shall be deemed necessary to the just decision of any claim, the commissioners, or the claimants through them, shall, within such period as congress may designate,

make an application in writing for the same, addressed to the Mexican minister for foreign affairs, to be transmitted by the secretary of state of the United States; and the Mexican government engages, at the earliest possible moment after the receipt of such demand, to cause any of the books, records, or documents, so specified, which shall be in their possession or power, (or authenticated copies or extracts of the same,) to be transmitted to the said secretary of state, who shall immediately deliver them over to the said board of commissioners: *Provided*, That no such application shall be made by, or at the instance of any claimant, until the facts which it is expected to prove by such books, records, or documents, shall have been stated under oath or affirmation.

ARTICLE XVI.

Each of the contracting parties reserves to itself the entire right to fortify whatever point within its territory it may judge proper so to fortify, for its security.

ARTICLE XVII.

The treaty of amity, commerce, and navigation concluded at the city of Mexico, on the fifth day of April, A. D., 1831, between the United States of America and the United Mexican States, except the additional article, and except so far as the stipulations of the said treaty may be incompatible with any stipulation contained in the present treaty, is hereby revived for the period of eight years from the day of the exchange of ratifications of this treaty, with the same force and virtue as if incorporated therein; it being understood that each of the contracting parties reserves to itself the right at any time after the said period of eight years shall have expired, to terminate the same by giving one year's notice of such intention to the other party.

ARTICLE XVIII.

All supplies whatever for troops of the United States in Mexico, arriving at ports in the occupation of such troops previous to the final evacuation thereof, although subsequently to the restoration of the custom-houses at such ports, shall be entirely exempt from duties and charges of any kind; the government of the United States hereby en-

gaging and pledging its faith to establish, and vigilantly to enforce all possible guards for securing the revenue of Mexico, by preventing the importation, under cover of this stipulation, of any articles other than such, both in kind and in quantity, as shall really be wanted for the use and consumption of the forces of the United States during the time they may remain in Mexico. To this end, it shall be the duty of all officers and agents of the United States to denounce to the Mexican authorities at the respective ports any attempts at a fraudulent abuse of this stipulation which they may know of, or may have reason to suspect, and to give to such authorities all the aid in their power with regard thereto; and every such attempt, when duly proved and established by sentence of a competent tribunal, shall be punished by the confiscation of the property so attempted to be fraudulently introduced.

ARTICLE XIX.

With respect to all merchandize, effects, and property whatsoever, imported into ports of Mexico whilst in the occupation of the forces of the United States, whether by citizens of either republic, or by citizens or subjects of any neutral nation, the following rules shall be observed:

1. All such merchandize, effects, and property, if imported previously to the restoration of the custom-houses to the Mexican authorities, as stipulated for in the third article of this treaty, shall be exempt from confiscation, although the importation of the same be prohibited by the Mexican tariff.

2. The same perfect exemption shall be enjoyed by all such merchandize, effects, and property, imported subsequently to the restoration of the custom-houses, and previously to the sixty days fixed in the following article for the coming into force of the Mexican tariff at such ports respectively; the said merchandize, effects, and property being, however, at the time of their importation, subject to the payment of duties, as provided for in the said following article.

3. All merchandize, effects, and property, described in the two rules foregoing, shall, during their continuance at the place of importation, and upon their leaving such place for the interior, be exempt from all duty, tax, or impost of every kind, under whatsoever title or denomination. Nor shall they be there subjected to any charge whatsoever upon the sale thereof.

4. All merchandize, effects, and property, described in the first and second rules, which shall have been removed to any place in the interior, whilst such place was in the occupation of the forces of the United States, shall, during their continuance therein, be exempt from all tax upon the sale or consumption thereof, and from every kind of impost or contribution, under whatsoever title or denomination.

5. But if any merchandize, effects, or property, described in the first and second rules, shall be removed to any place not occupied at the time by the forces of the United States, they shall, upon their introduction into such place, or upon their sale or consumption there, be subject to the same duties which, under the Mexican laws, they would be required to pay in such cases if they had been imported in time of peace, through the maritime custom-houses, and had there paid the duties conformably with the Mexican tariff.

6. The owners of all merchandize, effects, or property, described in the first and second rules, and existing in any port of Mexico, shall have the right to re-ship the same, exempt from all tax, impost, or contribution whatever.

With respect to the metals, or other property, exported from any Mexican port whilst in the occupation of the forces of the United States, and previously to the restoration of the custom-house at such port, no person shall be required by the Mexican authorities, whether general or state, to pay any tax, duty, or contribution upon any such exportation, or in any manner to account for the same to the said authorities.

ARTICLE XX.

Through consideration for the interests of commerce generally, it is agreed, that if *less* than sixty days should elapse between the date of the signature of this treaty and the restoration of the custom-houses, conformably with the stipulation in the third article, in such case all merchandize, effects, and property whatsoever, arriving at the Mexican ports after the restoration of the said custom-houses, and previously to the expiration of sixty days after the day of the signature of this treaty, shall be admitted to entry; and no other duties shall be levied thereon than the duties established by the tariff found in force at such custom-houses, at the time of the restoration of the same. And to all such merchandize, effects, and property, the rules established by the preceding article shall apply.

ARTICLE XXI.

If unhappily any disagreement should hereafter arise between the governments of the two republics, whether with respect to the interpretation of any stipulation in this treaty, or with respect to any other particular concerning the political or commercial relations of the two nations, the said governments, in the name of those nations, do promise to each other that they will endeavor, in the most sincere and earnest manner, to settle the differences so arising, and to preserve the state of peace and friendship in which the two countries are now placing themselves; using, for this end, mutual representations and pacific negotiations. And, if, by these means, they should not be enabled to come to an agreement, a resort shall not, on this account, be had to reprisals, aggression, or hostility of any kind, by the one republic against the other, until the government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good neighborship, whether it would not be better that such differences should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case.

ARTICLE XXII.

If (which is not to be expected, and which God forbid!) war should unhappily break out between the two republics, they do now, with a view to such calamity, solemnly pledge themselves to each other and to the world, to observe the following rules: absolutely, where the nature of the subject permits, and as closely as possible in all cases where such absolute observance shall be impossible.

1. The merchants of either republic then residing in the other shall be allowed to remain twelve months, (for those dwelling in the interior,) and six months (for those dwelling at the seaports,) to collect their debts and settle their affairs; during which periods, they shall enjoy the same protection, and be on the same footing, in all respects, as the citizens or subjects of the most friendly nations; and, at the expiration thereof, or at any time before, they shall have full liberty to depart, carrying off all their effects without molestation or hindrance: conforming therein to the same laws which the

citizens or subjects of the most friendly nations are required to conform to. Upon the entrance of the armies of either nation into the territories of the other, women and children, ecclesiastics, scholars of every faculty, cultivators of the earth, merchants, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all persons whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments unmolested in their persons. Nor shall their houses or goods be burnt or otherwise destroyed, nor their cattle taken, nor their fields wasted, by the armed force into whose power, by the events of war, they may happen to fall; but if the necessity arise to take anything from them for the use of such armed force, the same shall be paid for at an equitable price. All churches, hospitals, schools, colleges, libraries, and other establishments, for charitable and beneficent purposes, shall be respected, and all persons connected with the same protected in the discharge of their duties and the pursuit of their vocations.

2. In order that the fate of prisoners of war may be alleviated, all such practices as those of sending them into distant, inclement, or unwholesome districts, or crowding them into close and noxious places, shall be studiously avoided. They shall not be confined in dungeons, prison-ships, or prisons; nor be put in irons, or bound, or otherwise restrained in the use of their limbs. The officers shall enjoy liberty on their paroles, within convenient districts, and have comfortable quarters; and the common soldiers shall be disposed in cantonments, open and extensive enough for air and exercise, and lodged in barracks as roomy and good as are provided by the party in whose power they are, for its own troops. But if any officer shall break his parole by leaving the district so assigned him, or any other prisoner shall escape from the limits of his cantonment, after they shall have been designated to him, such individual, officer, or other prisoner, shall forfeit so much of the benefit of this article as provides for his liberty on parole or in cantonment. And if any officer so breaking his parole, or any common soldier so escaping from the limits assigned him, shall afterwards be found in arms, previously to his being regularly exchanged, the person so offending shall be dealt with according to the established laws of war. The officers shall be daily furnished by the party in whose power they are, with as many rations, and of the same articles, as are allowed, either in kind or by commutation, to officers of equal rank in its own army; and all others shall be daily furnished with such ration as is allowed to a

common soldier in its own service: the value of all which supplies shall, at the close of the war, or at periods to be agreed upon between the respective commanders, be paid by the other party, on a mutual adjustment of accounts for the subsistence of prisoners; and such accounts shall not be mingled with or set off against any others, nor the balance due on them be withheld, as a compensation or reprisal for any cause whatever, real or pretended. Each party shall be allowed to keep a commissary of prisoners, appointed by itself, with every cantonment of prisoners, in possession of the other; which commissary shall see the prisoners as often as he pleases; shall be allowed to receive, exempt from all duties or taxes, and to distribute, whatever comforts may be sent to them by their friends; and shall be free to transmit his reports in open letters to the party by whom he is employed.

And it is declared that neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending the solemn covenant contained in this article. On the contrary, the state of war is precisely that for which it is provided; and during which its stipulations are to be as sacredly observed as the most acknowledged obligations under the law of nature or nations.

ARTICLE XXIII.

This treaty shall be ratified by the president of the United States of America, by and with the advice and consent of the senate thereof; and by the president of the Mexican republic, with the previous approbation of its general congress; and the ratifications shall be exchanged in the city of Washington, or at the seat of government of Mexico, in four months from the date of the signature hereof, or sooner if practicable.

In faith whereof, we, the respective plenipotentiaries, have signed this treaty of peace, friendship, limits, and settlement; and have hereunto affixed our seals respectively. Done in quintuplicate, at the city of Guadalupe Hidalgo, on the second day of February, in the year of our Lord one thousand eight hundred and forty-eight.

N. P. TRIST, [L.S.]
LUIS G. CUEVAS, [L.S.]
BERNARDO COUTO, [L.S.]
MIGL. ATRISTAIN, [L.S.]

And whereas the said treaty, as amended, has been duly ratified on both parts, and the respective ratifications of the same were exchanged at Queretaro on the thirtieth day of May last, by Ambrose H. Sevier and Nathan Clifford, commissioners on the part of the government of the United States, and by Senor Don Louis de la Rosa, minister of relations of the Mexican Republic, on the part of that government:

Now, therefore, be it known, that I, JAMES K. POLK, president of the United States of America, have caused the said treaty to be made public, to the end that the same and every clause and article thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

{ L.S. } Done at the city of Washington, this fourth day of July, one thousand eight hundred and forty-eight, and of the Independence of the United States the seventy-third.

JAMES K. POLK.

By the President:

JAMES BUCHANAN, Secretary of State.

ARTICLES

REFERRED TO IN THE FIFTEENTH ARTICLE OF THE PRECEDING TREATY.

First and Fifth Articles of the Unratified Convention between the United States and the Mexican Republic of the 20th Nov., 1843.

ARTICLE I.

All claims of citizens of the Mexican Republic against the government of the United States, which shall be presented in the manner and time hereinafter expressed, and all claims of citizens of the United States against the Government of the Mexican Republic, which for whatever cause were not submitted to, nor considered, nor finally decided by the commission, nor by the arbiter appointed by the convention of 1839, and which shall be presented in the manner and time hereinafter specified, shall be referred to four commissioners, who shall form a board, and shall be appointed in the following manner, that is to say: Two commissioners shall be appointed by the president of the Mexican Republic, and the other two by the president of the United States, with the approbation and consent of the senate. The said commissioners, thus appointed, shall, in presence of each other, take an oath to examine and decide impartially the claims submitted to them, and which may lawfully be considered, according to the proofs which shall be presented, the principles of right and justice, the law of nations, and the treaties between the two republics.

ARTICLE V.

All claims of citizens of the United States against the government of the Mexican Republic, which were considered by the commissioners, and referred to the umpire appointed under the convention of the eleventh April, 1839, and which were not decided by him, shall be referred to, and decided by the umpire to be appointed, as provided by this convention, on the points submitted to the umpire under the late convention, and his decision shall be final and conclusive. It is also agreed, that, if the respective commissioners shall deem it expedient, they may submit to the said arbiter new arguments upon the said claims.

CONSTITUTION

OF THE

STATE OF CALIFORNIA.

PROCLAMATION TO THE PEOPLE OF CALIFORNIA.

The delegates of the people assembled in convention have formed a constitution, which is now presented for your ratification. The time and manner of voting on this constitution, and of holding the first general election, are clearly set forth in the schedule; the whole subject is therefore left for your unbiassed and deliberate consideration.

The prefect (or person exercising the functions of that office) of each district will designate the places for opening the polls, and give due notice of the election, in accordance with the provisions of the constitution and schedule.

The people are now called upon to form a government for themselves, and to designate such officers as they desire to make and execute the laws. That their choice may be wisely made, and that the government so organized may secure the permanent welfare and happiness of the people of the new state, is the sincere and earnest wish of the present executive, who, if the constitution be ratified, will, with pleasure, surrender his powers to whomsoever the people may designate as his successor.

Given at Monterey, California, this 12th day of October, A. D., 1849.

B. RILEY,
Bvt. Brig. Gen'l U. S. A., and Governor of California.

Official: H. W. HALLECK,
Brev. Capt. and Secretary of State.

WE, the People of California, grateful to Almighty God for our freedom, in order to secure its blessings, do establish this Constitution.

ARTICLE I.

DECLARATION OF RIGHTS.

SEC. 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness.

SEC. 2. All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people; and they have the right to alter or reform the same, whenever the public good may require it.

SEC. 3. The right of trial by jury shall be secured to all, and remain inviolate for ever; but a jury trial may be waived by the parties, in all civil cases, in the manner to be prescribed by law.

SEC. 4. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience, hereby secured, shall not be so construed as to excuse acts of licentiousnesss, or justify practices inconsistent with the peace or safety of this state.

SEC. 5. The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require its suspension.

SEC. 6. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

SEC. 7. All persons shall be bailable by sufficient sureties; unless for capital offences, when the proof is evident or the presumption great.

SEC. 8. No person shall be held to answer for a capital or other infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny under the regulation of the legislature,) unless on presentment or indictment of a grand jury

and in any trial in any court whatever, the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offence; nor shall he be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

SEC. 9. Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions on indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

SEC. 10. The people shall have the right freely to assemble together, to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances.

SEC. 11. All laws of a general nature shall have a uniform operation.

SEC. 12. The military shall be subordinate to the civil power. No standing army shall be kept up by this state in time of peace; and in time of war no appropriation for a standing army shall be for a longer time than two years.

SEC. 13. No soldier shall in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, except in the manner to be prescribed by law.

SEC. 14. Representation shall be apportioned according to population.

SEC. 15. No person shall be imprisoned for debt, in any civil action on *mense* or final process unless in cases of fraud; and no person shall be imprisoned for a militia fine in time of peace.

SEC. 16. No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed.

SEC. 17. Foreigners who are, or may hereafter become *bona fide* residents of this state, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property, as native born citizens.

SEC. 18. Neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this state.

SEC. 19. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

SEC. 20. Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort. No person shall be convicted of treason, unless on the evidence of two witnesses to the same overt act, or confession in open court.

SEC. 21. This enumeration of rights shall not be construed to impair or deny others retained by the people.

ARTICLE II.

RIGHT OF SUFFRAGE.

SEC. 1. Every white male citizen of the United States, and every white male citizen of Mexico, who shall have elected to become a citizen of the United States, under the treaty of peace exchanged and ratified at Queretaro, on the 30th day of May, 1848, of the age of twenty-one years, who shall have been a resident of the state six months next preceding the election, and the county or district in which he claims his vote thirty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law: Provided, that nothing herein contained shall be construed to prevent the legislature, by a two-thirds concurrent vote, from admitting to the right of suffrage, Indians or the descendants of Indians, in such special cases as such a proportion of the legislative body may deem just and proper.

SEC. 2. Electors shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest on the days of the election, during their attendance at such election, going to and returning therefrom.

SEC. 3. No elector shall be obliged to perform militia duty on the day of election, except in time of war or public danger.

SEC. 4. For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States; nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor

while kept at any almshouse, or other asylum, at public expense; nor while confined in any public prison.

SEC. 5. No idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector.

SEC. 6. All elections by the people shall be by ballot.

ARTICLE III.

DISTRIBUTION OF POWERS.

The powers of the government of the state of California shall be divided into three separate departments: the legislative, the executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted.

ARTICLE IV.

LEGISLATIVE DEPARTMENT.

SEC. 1. The legislative power of this state shall be vested in a senate and assembly, which shall be designated the legislature of the state of California; and the enacting clause of every law shall be as follows: "The people of the state of California, represented in senate and assembly, do enact as follows."

SEC. 2. The sessions of the legislature shall be annual, and shall commence on the first Monday of January, next ensuing the election of its members, unless the governor of the state shall, in the interm, convene the legislature by proclamation.

SEC. 3. The members of the assembly shall be chosen annualy, by the qualified electors of their respective districts, on the Tuesday next after the first Monday in November, unless otherwise ordered by the legislature, and their term of office shall be one year.

SEC. 4. Senators and members of assembly shall be duly qualified electors in the respective counties and districts which they represent.

SEC. 5. Senators shall be chosen for the term of two years, at the same time and places as members of assembly; and no person shall be a member of the senate or assembly who

has not been a citizen and inhabitant of the state one year, and of the county or district for which he shall be chosen six months next before his election.

SEC. 6. The number of senators shall not be less than one third, nor more than one half, of that of the members of assembly; and at the first session of the legislature after this constitution takes effect, the senators shall be divided by lot, as equally as may be, into two classes; the seats of the senators of the first class shall be vacated at the expiration of the first year, so that one half shall be chosen annually.

SEC. 7. When the number of senators is increased, they shall be appointed by lot, so as to keep the two classes as nearly equal in number as possible.

SEC. 8. Each house shall choose its own officers, and judge of the qualifications, elections, and returns of its own members.

SEC. 9. A majority of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

SEC. 10. Each house shall determine the rules of its own proceedings, and may, with the concurrence of two-thirds of all the members elected, expel a member.

SEC. 11. Each house shall keep a journal of its own proceedings, and publish the same; and the yeas and nays of the members of either house, on any question, shall, at the desire of any three members present, be entered on the journal.

SEC. 12. Members of the legislature shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest, and they shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session.

SEC. 13. When vacancies occur in either house, the governor, or the person exercising the functions of the governor, shall issue writs of elections to fill such vacancies.

SEC. 14. The doors of each house shall be open, except on such occasions as, in the opinion of the house, may require secresy.

SEC. 15. Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which they may be sitting.

SEC. 16. Any bill may originate in either house of the

legislature, and all bills passed by one house may be amended in the other.

SEC. 17. Every bill which may have passed the legislature shall, before it becemes a law, be presented to the governor. If he approve it, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which shall enter the same upon the journal, and proceed to reconsider it. If, after such reconsideration, it again pass both houses, by yeas and nays, by a majority of two-thirds of the members of each house present, it shall become a law, notwithstanding the governor's objections. If any bill shall not be returned within ten days after it shall have been presented to him, (Sunday excepted,) the same shall be a law, in like manner as if he had signed it, unless the legislature, by adjournment, prevent such return.

SEC. 18. The assembly shall have the sole power of impeachment; and all impeachments shall be tried by the senate. When sitting for that purpose, the senators shall be upon oath or affirmation; and no person shall be convicted, without the concurrence of two-thirds of the members present.

SEC. 19. The governor, lieutenant-governor, secretary of state, comptroller, treasurer, attorney general, surveyor general, justices of the supreme court, and judges of the district courts, shall be liable to impeachment for any misdemeanor in office; but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust, or profit, under the state; but the party convicted or acquitted shall nevertheless be liable to indictment, trial, and punishment, according to law. All other civil officers shall be tried, for misdemeanors in office, in such a manner as the legislature may provide.

SEC. 20. No senator or member of assembly shall, during the term for which he shall have been elected, be appointed to any civil office of profit, under this state, which shall have been created, or the emoluments of which shall have been increased, during such term, except such office as may be filled by elections by the people.

SEC. 21. No person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit, under this state; provided, that officers in the militia, to which there is attached no annual salary, or local officers and postmasters whose compensation does not exceed five hundred dollars per annum, shall not be deemed lucrative.

SEC. 22. No person who shall be convicted of the em-

bezzlement, or defalcation of the public funds of this state, shall ever be eligible to any office of honor, trust, or profit, under this state; and the legislature shall, as soon as practicable, pass a law providing for the punishment of such embezzlement or defalcation as a felony.

SEC. 23. No money shall be drawn from the treasury but in consequence of appropriations made by law. An accurate statement of the receipts and expenditures of the public moneys, shall be attached to and published with the laws at every regular session of the legislature.

SEC. 24. The members of the legislature shall receive for their services a compensation to be fixed by law, and paid out of the public treasury; but no increase of the compensation shall take effect during the term for which the members of either house shall have been elected.

SEC. 25. Every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title; and no law shall be revised or amended by reference to this title; but in such case, the act revised, or section amended, shall be re-enacted and published at length.

SEC. 26. No divorce shall be granted by the legislature.

SEC. 27. No lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed.

SEC. 28. The enumeration of the inhabitants of this state shall be taken, under the direction of the legislature, in the year one thousand eight hundred and fifty-two, and one thousand eight hundred and fifty-five, and at the end of every ten years thereafter; and these enumerations, together with the census that may be taken under the direction of the congress of the United States in the year one thousand eight hundred and fifty, and every subsequent ten years, shall serve as the basis of representation in both houses of the legislature.

SEC. 29. The number of senators and members of assembly shall, at the first session of the legislature holden after the enumeration herein provided for and made, be fixed by the legislature, and apportioned among the several counties and districts to be established by law, according to the number of white inhabitants. The number of members of assembly shall not be less than twenty-four, nor more than thirty-six, until the number of inhabitants within this state shall amount to one hundred thousand; and after that period, at such ratio that the whole number of members of assembly shall never be less than thirty, nor more than eighty.

SEC. 30. When a congressional, senatorial, or assembly

district shall be composed of two or more counties, it shall not be separated by any county belonging to another district; and no county shall be divided, in forming a congressional, senatorial, or assembly district.

SEC. 31. Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed.

SEC. 32. Dues from corporations shall be secured by such individual liability of the corporators, and other means, as may be prescribed by law.

SEC. 33. The term corporations, as used in this article, shall be construed to include all associations and joint-stock companies, having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons.

SEC. 34. The legislature shall have no power to pass any act granting any charter for banking purposes; but associations may be formed, under general laws, for the deposit of gold and silver, but no such association shall make, issue, or put in circulation any bill, check, ticket, certificate, promissory note, or other paper, or the paper of any bank, to circulate as money.

SEC. 35. The legislature of this state shall prohibit, by law, any person or persons, association, company, or corporation, from exercising the privileges of banking, or creating paper to circulate as money.

SEC. 36. Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for his proportion of all its debts and liabilities.

SEC. 37. It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations.

SEC. 38. In all elections by the legislature, the members thereof shall vote *viva voce*, and the votes shall be entered on the journal.

ARTICLE V.

EXECUTIVE DEPARTMENT.

SEC. 1. The supreme executive power of this state shall be vested in a chief magistrate, who shall be styled the governor of the state of California.

SEC. 2. The governor shall be elected by the qualified electors, at the time and places of voting for members of assembly, and shall hold his office two years from the time of his installation, and until his successor shall be qualified.

SEC. 3. No person shall be eligible to the office of governor (except at the first election) who has not been a citizen of the United States and a resident of this state two years next preceding the election, and attained the age of twenty-five years at the time of said election.

SEC. 4. The returns of every election for governor shall be sealed up and transmitted to the seat of government, directed to the speaker of the assembly, who shall, during the first week of the session, open and publish them in presence of both houses of the legislature. The person having the highest number of votes shall be governor; but in case any two or more have an equal and the highest number of votes, the legislature shall, by joint vote of both houses, choose one of said persons, so having an equal and the highest number of votes, for governor.

SEC. 5. The governor shall be commander-in-chief of the militia, the army and navy of this state.

SEC. 6. He shall transact all executive business with the officers of government, civil and military, and may require information in writing from the officers of the executive department, upon any subject relating to the duties of their respective offices.

SEC. 7. He shall see that the laws are faithfully executed.

SEC. 8. When any office shall, from any cause, become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the governor shall have power to fill such vacancy by granting a commission, which shall expire at the end of the next session of the legislature, or at the next election by the people.

SEC. 9. He may, on extraordinary occasions, convene the legislature by proclamation, and shall state to both houses, when assembled, the purpose for which they shall have been convened.

SEC. 10. He shall communicate by message to the legislature, at every session, the condition of the state, and recommend such matters as he shall deem expedient.

SEC. 11. In case of a disagreement between the two houses, with respect to the time of adjournment, the governor shall have power to adjourn the legislature to such time as he may think proper; provided it be not beyond the time fixed for the meeting of the next legislature.

SEC. 12. No person shall, while holding any office under the United States, or this state, exercise the office of governor, except as hereinafter expressly provided.

SEC. 13. The governor shall have the power to grant reprieves and pardons after conviction, for all offences except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, he shall have the power to suspend the execution of the sentence until the case shall be reported to the legislature at its next meeting, when the legislature shall either pardon, direct the execution of the sentence, or grant a further reprieve. He shall communicate to the legislature, at the beginning of every session, every case of reprieve or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the pardon or reprieve.

SEC. 14. There shall be a seal of this state, which shall be kept by the governor, and used by him officially, and shall be called "The great seal of the state of California."

SEC. 15. All grants and commissions shall be in the name and by the authority of the people of the state of California, sealed with the great seal of the state, signed by the governor, and countersigned by the secretary of state.

SEC. 16. A lieutenant governor shall be elected at the same time and places, and in the same manner as the governor; and his term of office, and his qualifications of eligibility, shall also be the same. He shall be president of the senate, but shall only have a casting vote therein. If, during a vacancy of the office of governor, the lieutenant governor shall be impeached, displaced, resign, die, or become incapable of performing the duties of his office, or be absent from the state, the president of the senate shall act as governor, until the vacancy be filled, or the disability shall cease.

SEC. 17. In case of the impeachment of the governor, or his removal from office, death, inability to discharge the

powers and duties of the said office, resignation, or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term, or until the disability shall cease. But when the governor shall, with the consent of the legislature, be out of the state in time of war, at the head of any military force therof, he shall continue commander-in-chief of the military force of the state.

SEC. 18. A secretary of state, a comptroller, a treasurer, an attorney-general, and surveyor general, shall be chosen in the manner provided in this constitution; and the term of office, and eligibility of each, shall be the same as are prescribed for the governor and lieutenant governor.

SEC. 19. The secretary of state shall be appointed by the governor, by and with the advice and consent of the senate. He shall keep a fair record of the official acts of the legislative and executive departments of the government, and shall, when required, lay the same, and all matters relative thereto, before either branch of the legislature; and shall perform such other duties as shall be assigned him by law.

SEC. 20. The comptroller, treasurer, attorney general, and surveyor general, shall be chosen by joint vote of the two houses of the legislature, at their first session under this constitution, and thereafter shall be elected at the same time and places, and in the same manner as the governor and lieutenant governor.

SEC. 21. The governor, lieutenant governor, secretary of state, comptroller, treasurer, attorney-general, and surveyor general, shall each, at stated times during their continuance in office, receive for their services a compensation, which shall not be increased or diminished during the term for which they shall have been elected; but neither of these officers shall receive for his own use any fees for the performance of his official duties.

ARTICLE VI.

JUDICIAL DEPARTMENT.

SEC. 1. The judicial power of this state shall be vested in a supreme court, in district courts, in county courts, and in justices of the peace. The legislature may also establish such municipal and other inferior courts as may be deemed necessary.

SEC. 2. The supreme court shall consist of a chief justice

and two associate justices, any two of whom shall constitute a quorum.

SEC. 3. The justices of the supreme court shall be elected at the general election, by the qualified electors of the state, and shall hold their office for the term of six years from the first day of January next after their election; provided that the legislature shall, at its first meeting, elect a chief justice and two associate justices of the supreme court, by joint vote of both houses, and so classify them that one shall go out of office every two years. After the first election, the senior justice in commission shall be the chief justice.

SEC. 4. The supreme court shall have appellate jurisdiction in all cases when the matter in dispute exceeds two hundred dollars, when the legality of any tax, toll, or impost or municipal fine is in question, and in all criminal cases amounting to felony or questions of law alone. And the said court, and each of the justices thereof, as well as all district and county judges, shall have power to issue writs of *habeas corpus* at the instance of any person held in actual custody. They shall also have power to issue all other writs and process necessary to the exercise of their appellate jurisdiction, and shall be conservators of the peace throughout the state.

SEC. 5. The state shall be divided by the first legislature into a convenient number of districts, subject to such alteration from time to time as the public good may require, for each of which a district judge shall be appointed by the joint vote of the legislature, at its first meeting, who shall hold his office for two years from the first day of January next after his election; after which, said judges shall be elected by the qualified electors of their respective districts, at the general election, and shall hold their office for the term of six years.

SEC. 6. The district courts shall have original jurisdiction, in law and equity, in all civil cases where the amount in dispute exceeds two hundred dollars, exclusive of interest. In all criminal cases not otherwise provided for, and in all issues of fact joined in the probate courts, their jurisdiction shall be unlimited.

SEC. 7. The legislature shall provide for the election, by the people, of a clerk of the supreme court, and county clerks, district attorneys, sheriffs, coroners, and other necessary officers; and shall fix by law their duties and compensation. County clerks shall be, *ex officio*, clerks of the district courts in and for their respective counties.

SEC. 8. There shall be elected in each of the organized counties of this state, one county judge, who shall hold his office for four years. He shall hold the county court, and

perform the duties of surrogate, or probate judge. The county judge, with two justices of the peace, to be designated according to law, shall hold courts of sessions with such criminal jurisdiction as the legislature shall prescribe, and he shall perform such other duties as shall be required by law.

SEC. 9. The county courts shall have such jurisdiction, in cases arising in justice's courts, and in special cases, as the legislature may prescribe, but shall have no original civil jurisdiction, except in such special cases.

SEC 10. The times and places of holding the terms of the supreme court, and the general and special terms of the district courts within the several districts, shall be provided for by law.

SEC. 11. No judicial officer, except a justice of the peace, shall receive, to his own use, any fees or perquisites of office.

SEC. 12. The legislature shall provide for the speedy publication of all statute laws, and of such judicial decisions as it may deem expedient; and all laws and judicial decisions shall be free for publication by any person.

SEC. 13. Tribunals for conciliation may be established, with such powers and duties as may be prescribed by law; but such tribunals shall have no power to render judgment to be obligatory on the parties, except they voluntarily submit their matters in difference, and agree to abide the judgment, or assent thereto in the presence of such tribunal, in such cases as shall be prescribed by law.

SEC. 14. The legislature shall determine the number of justices of the peace, to be elected in each county, city, town, and incorporated village of the state, and fix by law their powers, duties, and responsibilities. It shall also determine in what cases appeals may be made from justices' courts to the county court.

SEC. 15. The justices of the supreme court and judges of the district court, shall severally, at stated times during their continuance in office, receive for their services a compensation to be paid out of the treasury, which shall not be increased or diminished during the term for which they shall have been elected. The county judges shall also severally, at stated times, receive for their services, a compensation to be paid out of the county treasury of their respective counties, which shall not be increased or diminished during the term for which they shall have been elected.

SEC. 16. The justices of the supreme court and district judges shall be ineligible to any other office during the term for which they have been elected.

SEC. 17. Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.

SEC. 18. The style of all process shall be "The People of the State of California;" all the prosecutions shall be conducted in the name and by the authority of the same.

ARTICLE VII.

MILITIA.

SEC. 1. The legislature shall provide by law for organizing and disciplining the militia, in such manner as they shall deem expedient, not incompatible with the constitution and laws of the United States.

SEC. 2. Officers of the militia shall be elected or appointed, in such a manner as the legislature shall from time to time direct, and shall be commissioned by the governor.

SEC. 3. The governor shall have power to call forth the militia, to execute the laws of the state, to suppress insurrections, and repel invasions.

ARTICLE VIII.

STATE DEBTS.

The legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly, or in the aggregate, with any previous debts or liabilities, exceed the sum of three hundred thousand dollars, except in case of war, to repel invasion, or suppress insurrection, unless the same shall be authorized by some law for some single object or work, to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability, as it falls due, and also pay and discharge the principal of such debt or liability within twenty years from the time of the contracting thereof, and shall be irrepealable until the principal and interest thereon shall be paid and discharged; but no such law shall take effect until, at a general election, it shall have been submitted to the people, and have received a majority of all the votes cast for and against at such election; and all money raised by authority of such law, shall be applied only to the specified object therein stated, or to the payment of the debt thereby created; and such law shall be published in at least one newspaper in each judicial district, if one be published therein, throughout the state, for three months next preceding the election at which it is submitted to the people.

ARTICLE IX.

EDUCATION.

SEC. 1. The legislature shall provide for the election, by the people, of a superintendent of public instruction, who shall hold his office for three years, and whose duties shall be prescribed by law, and who shall receive such compensation as the legislature may direct.

SEC. 2. The legislature shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement. The proceeds of all land that may be granted by the United States to this state for the support of schools, which may be sold or disposed of, and the five hundred thousand acres of land granted to the new states, under an act of congress distributing the proceeds of the public lands among the several states of the union, approved A.D., 1841; and all estates of deceased persons who may have died without leaving a will, or heir, and also such per cent. as may be granted by congress on the sale of lands in this state, shall be and remain a perpetual fund, the interest of which, together with all the rents of the unsold lands, and such other means as the legislature may provide, shall be inviolably appropriated to the support of common schools throughout the state.

SEC. 3. The legislature shall provide for a system of common schools, by which a school shall be kept up and supported in each district at least three months in every year, and any school neglecting to keep and support such a school may be deprived of its proportion of the interest of the public fund during such neglect.

SEC. 4. The legislature shall take measures for the protection, improvement, or other disposition of such lands as have been, or may hereafter be reserved or granted by the United States, or any person or persons, to the state for the use of a university; and the funds accruing from the rents or sale of such lands, or from any other source for the purpose aforesaid, shall be and remain a permanent fund, the interest of which shall be applied to the support of said university, with such branches as the public convenience may demand, for the promotion of literature, the arts and sciences, as may be authorized by the terms of such grant. And it shall be the duty of the legislature, as soon as may be, to provide effectual means for the improvement and permanent security of the funds of said university.

ARTICLE X.

MODE OF AMENDING AND REVISING THE CONSTITUTION.

SEC. 1. Any amendment or amendments to this constitution, may be proposed in the senate or assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature then next to be chosen, and shall be published for three months next preceding the time of making such choice. And if in the legislature next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment or amendments to the people, in such manner and at such time as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the legislature voting thereon, such amendment or amendments shall become part of the constitution.

SEC. 2. And if, at any time, two-thirds of the senate and assembly shall think it necessary to revise and change this entire constitution, they shall recommend to the electors, at the next election for members of the legislature, to vote for or against the convention; and if it shall appear that a majority of the electors voting at such election have voted in favor of calling a convention, the legislature shall, at its next session, provide by law for calling a convention, to be holden within six months after the passage of such law; and such convention shall consist of a number of members not less than that of both branches of the legislature.

ARTICLE XI.

PROMISCUOUS PROVISIONS.

SEC. 1. The first session of the legislature shall be held at the Peublo de San Jose; which place shall be the permanent seat of government until removed by law: Provided, however, that two-thirds of all the members elected to each house of the legislature shall concur in the passage of such law.

SEC. 2. Any citizen of this state who shall, after the adoption of this constitution, fight a duel with deadly weapons, or send or accept a challenge to fight a duel with deadly weapons, either within this state or out of it; or who shall act as second, or knowingly aid or assist in any manner those thus offending, shall not be allowed to hold any office of profit or to enjoy the right of suffrage under this constitution.

SEC. 3. Members of the legislature, and all officers, executive and judicial, except such inferior officers as may be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation:

"I do solemnly swear (or affirm, as the case may be,) that I will support the constitution of the United States, and the constitution of the state of California, and that I will faithfully discharge the duties of the office of ———, according to the best of my ability."

And no other oath, declaration, or test, shall be required as a qualification for any office or public trust.

SEC. 4. The legislature shall establish a system of county and town governments, which shall be as nearly uniform as practicable throughout the state.

SEC. 5. The legislature shall have power to provide for the election of a board of supervisors in each county; and these supervisors shall jointly and individually perform such duties as may be prescribed by law.

SEC. 6. All officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed as the legislature may direct.

SEC. 7. When the duration of any office is not provided for by this constitution, it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment; nor shall the duration of any office, not fixed by this constitution, ever exceed four years.

SEC. 8. The fiscal year shall commence on the first day of July.

SEC. 9. Each county, town, city, and incorporated village, shall make provision for the support of its own officers, subject to such restrictions and regulations as the legislature may prescribe.

SEC. 10. The credit of the state shall not, in any manner, be given or loaned to or in aid of any individual, association, or corporation; nor shall the state directly or indirectly become a stockholder in any association or corporation.

SEC. 11. Suits may be brought against the state in such manner, and in such courts, as shall be directed by law.

SEC. 12. No contract of marriage, if otherwise duly made, shall be invalidated for want of conformity to the requirements of any religious sect.

SEC. 13. Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value, to be ascertained as directed by law; but assessors and collectors of town, county, and state taxes, shall be elected by the qualified electors of the district, county, or town in which the property taxed for state, county, or town purposes is situated.

SEC. 14. All property, both real and personal, of the wife, owned or claimed by marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

SEC. 15. The legislature shall protect by law, from forced sale, a certain portion of the homestead and other property of all heads of families.

SEC. 16. No perpetuities shall be allowed, except for eleemosynary purposes.

SEC. 17. Every person shall be disqualified from holding any office of profit in this state who shall have been convicted of having given, or offered a bribe, to procure his election or appointment.

SEC. 18. Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, those who shall hereafter be convicted of bribery, perjury, forgery, or other high crimes. The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice.

SEC. 19. Absence from this state on business of the state, or of the United States, shall not affect the question of residence of any person.

SEC. 20. A plurality of the votes given at an election shall constitute a choice, where not otherwise directed in this constitution.

SEC. 21. All laws, decrees, regulations, and provisions, which from their nature require publication, shall be published in English and Spanish.

ARTICLE XII.

BOUNDARY.

The boundary of the state of California shall be as follows: Commencing at the point of intersection of 42d degree of north latitude with the 120th degree of longitude west from Greenwich, and running south on the line of said 120th degree of west longitude until it intersects the 39th degree of north latitude; thence running in a straight line in a southeasterly direction to the river Colorado, at a point where it intersects the 35th degree of north latitude; thence down the middle of the channel of said river to the boundary line between the United States and Mexico, as established by the treaty of May 30th, 1848; thence running west and along said boundary line to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific coast to the 42d degree of north latitude; thence on the line of said 42d degree of north latitude to the place of beginning. Also all the islands, harbors, and bays along and adjacent to the Pacific coast.

SCHEDULE.

SEC. 1. All rights, prosecutions, claims and contracts, as well of individuals as of bodies corporate, and all laws in force at the time of the adoption of this constitution, and not inconsistent therewith, until altered or repealed by the legislature, shall continue as if the same had not been adopted.

SEC. 2. The legislature shall provide for the removal of all causes which may be pending when this constitution goes into effect, to courts created by the same.

SEC. 3. In order that no inconvenience may result to the public service, from the taking effect of this constitution, no office shall be superseded thereby, nor the laws relative to the duties of the several officers be changed, until the entering into office of the new officers to be appointed under this constitution.

SEC. 4. The provisions of this constitution concerning the term of residence necessary to enable persons to hold certain offices therein mentioned, shall not be held to apply to officers chosen by the people at the first election, or by the legislature at its first session.

SEC. 5. Every citizen of California, declared a legal voter by this constitution, and every citizen of the United States, a resident of this state on the day of election, shall be entitled to vote at the first general election under this constitution, and on the question of the adoption thereof.

SEC. 6. This constitution shall be submitted to the people, for their ratification or rejection, at the general election to be held on Tuesday, the thirteenth day of November next. The executive of the existing government of California is hereby requested to issue a proclamation to the people, directing the prefects of the several districts, or in case of vacancy, the sub-prefects, or senior judge of first instance, to cause such election to be held, the day aforesaid, in the respective districts. The election shall be conducted in the manner which was prescribed for the election of delegates to this convention, except that the prefect, sub-prefect, or senior judge of first instance, ordering such election in each district, shall have power to designate any additional number of places for opening the polls, and that, in every place of holding the election, a regular poll-list shall be kept by the judges and inspectors of election. It shall also be the duty of these judges and inspectors of election, on the day aforesaid, to receive the votes of the electors qualified to vote at such election. Each voter shall express his opinion, by depositing in the ballot-box a ticket, whereon shall be written or printed, "For the Constitution," or "Against the Constitution," or some such words as will distinctly convey the intention of the voter. These judges and inspectors shall also receive the votes for the several officers to be voted for at the said election as herein provided. At the close of the election, the judges and inspectors shall carefully count each ballot, and forthwith make duplicate returns thereof to the prefect, sub-prefect, or senior judge of first instance, as the case may be, of their respective districts; and said prefect, sub-prefect, or senior judge of first instance, shall transmit one of the same, by the most safe and rapid conveyance, to the secretary of state. Upon the receipt of said returns, or on the tenth day of December next, if the returns be not sooner received, it shall be the duty of a board of canvassers, to consist of the secretary of state, one of the judges of the superior court, the prefect, judge of first instance, and an alcade of the district of Monterey, or any three of the aforementioned officers, in the presence of all who shall choose to attend, to compare the votes given at said election, and to immediately publish an abstract of the same in one or more of the newspapers of California. And the executive will

also, immediately after ascertaining that the constitution has been ratified by the people, make proclamation of the fact; and thenceforth this constitution shall be ordained and established as the constitution of California.

SEC. 7. If this constitution shall be ratified by the people of California, the executive of the existing government is hereby requested immediately after the same shall be ascertained, in the manner herein directed, to cause a fair copy thereof to be forwarded to the president of the United States, in order that he may lay it before the congress of the United States.

SEC. 8. At the general election aforesaid, viz., the thirteenth day of November next, there shall be elected a governor, lieutenant governor, members of the legislature, and also two members of congress.

SEC. 9. If this constitution shall be ratified by the people of California, the legislature shall assemble at the seat of government on the fifteenth day of December next, and in order to complete the organization of that body, the senate shall elect a president *pro tempore*, until the lieutenant governor shall be installed into office.

SEC. 10. On the organization of the legislature, it shall be the duty of the secretary of state, to lay before each house, a copy of the abstract made by the board of canvassers, and if called for, the original returns of election, in order that each house may judge of the correctness of the report of said board of canvassers.

SEC. 11. The legislature, at its first session, shall elect such officers as may be ordered by this constitution, to be elected by that body, and within four days after its organization, proceed to elect two senators to the congress of the United States. But no law passed by this legislature shall take effect until signed by the governor after his installation into office.

SEC. 12. The senators and representatives to the congress of the United States, elected by the legislature and people of California, as herein directed, shall be furnished with certified copies of this constitution, when ratified, which they shall lay before the congress of the United States, requesting, in the name of the people of California, the admission of the state of California into the American Union.

SEC. 13. All officers of this state, other than members of the legislature, shall be installed into office on the fifteenth day of December next, or as soon thereafter as practicable.

SEC. 14. Until the legislature shall divide the state into counties, and senatorial and assembly districts, as directed by this constitution, the following shall be the apportionment of

the two houses of the legislature, viz. the districts of San Diego and Los Angeles, shall jointly elect two senators; the districts of Santa Barbara and San Luis Obispo, shall jointly elect one senator; the district of Monterey, one senator; the district of San Jose, one senator; the district of San Francisco, two senators; the district of Sonoma, one senator; the district of Sacramento, four senators; and the district of San Joaquin, four senators. And the district of San Diego shall elect one member of assembly; the district of Los Angeles, two members of assembly; the district of Santa Barbara, two members of assembly; the district of San Luis Obispo, one member of assembly; the district of Monterey, two members of assembly; the district of San Jose, three members of assembly; the district of San Francisco, five members of assembly; the district of Sonoma, two members of assembly; the district of Sacramento, nine members of assembly; and the district of San Joaquin, nine members of assembly.

SEC. 15. Until the legislature shall otherwise direct, in accordance with the provisions of this constitution, the salary of the governor shall be ten thousand dollars per annum; and the salary of the lieutenant governor shall be double the pay of a state senator; and the pay of members of the legislature shall be sixteen dollars per diem, while in attendance, and sixteen dollars for every twenty miles' travel by the usual route from their residences, to the place of holding the session of the legislature, and in returning therefrom. And the legislature shall fix the salaries of all officers, other than those elected by the people, at the first election.

SEC. 16. The limitation of the powers of the legislature, contained in article 8th of this constitution, shall not extend to the first legislature elected under the same, which is hereby authorized to negotiate for such amount as may be necessary to pay the expenses of the state government.

R. SEMPLE,
President of the Convention, and Delegate from Benicia.

WM. G. MARCY, *Secretary.*

J. Aram,	B. S. Lippincott,
C. T. Botts,	M. M. McCarver,
E. Brown,	John McDougal,
J. A. Carrillo,	B. F. Moore,
J. M. Covarrubias,	Myron Norton,
E. O. Crosby,	P. Ord,
P. De La Guerra,	Miguel Pedrorena,
L. Dent,	A. M. Pico,

M. Dominguez,
K. H. Dimmick,
A. J. Ellis,
S. C. Foster,
E. Gilbert,
W. M. Gwin,
H. W. Halleck,
Julien Hanks,
L. W. Hastings,
Henry Hill,
J. Hobson,
J. McH. Hollinsworth,
J. D. Hoppe,
J. M. Jones,
T. O. Larkin,
Francis J. Lippitt,
R. M. Price,
Hugo Reid,
Jacinto Rodriguez,
Pedro Sansevaine,
W. E. Shannon,
W. S. Sherwood,
J. R. Snyder,
A. Stearns,
W. M. Steuart,
J. A. Sutter,
Henry A. Tefft,
S. L. Vermeule,
M. G. Vallejo,
J. Walker,
O. M. Wozencraft.

TREATISE.

CHAPTER I.

JURISDICTION OF THE COURTS, &c.

THE constitution and treaties of the United States, constitution and statutes of California, and the common law are the laws in force in this state.

The powers, legislative, executive, and judicial, given to the government of the United States, are to be wielded, without interference or interruption from the powers or action of the state governments. Treaties made by the United States with a foreign power are the paramount laws of the land, binding on all the departments of the government of the United States, her citizens and residents within her boundaries, and her state and territorial governments.

Upon the admission of California as a state, her people were at the time admitted to all the rights of those of one of the original states. The act of admission gave the state its existence, and from that time it was in possession of all legislative, judicial, and executive powers, not granted by the original states to the general government by the constitution of the United States and prohibited by her own constitation. The provisions of her constitution operate as an act of congress binding upon the general government, if constitutional, and not opposed to the provisions of any treaty, but if counter to an act or acts of congress it operates their repeal in favor of California.

The legislative powers of the state are subject to the constitution and treaties of the United States and her own constitution, and must be wielded within those limits; if counter thereto, they are void and of no effect. The law making power in California is confided to a legislature, which is constituted of two houses, a senate and assembly. Where there are two-thirds of each house in favor of the passage of a law, the governor's consent is not required: otherwise his consent is necessary to its passage. The common law of England, not contravening the constitution and treaties of the United States, the constitution and statutes of the state apply next, which are those principles and rules of civil conduct adopted by England for the government of her people, and enforced by her courts of law and equity. The statute law of that country is not included unless it is merely declaratory of what the common law is, then it is to be ranked as part of our law.(*a*)

The people of California have placed the judicial power of the state in a supreme court, district courts, superior court of San Francisco, county courts, the courts of sessions, probate courts, justices' courts, recorders' courts, and mayors' courts.

These courts are created, their jurisdiction pointed out, and limited by the constitution and laws of California.

The judges of the various courts are elected to office by the people of the district over which their jurisdiction extends, and their term of service is fixed and determined by the law.

The justices', mayors' and recorders' courts are not courts of record; the rest are.

The supreme court is composed of three judges, any two of whom concurring can pronounce a judgment.

The district courts, the superior court of San Francisco, and the county and probate courts are composed of one judge; the court of sessions is composed of the judge of the county court, together with two justices of the peace, who sit as associate judges.(*a*)

(*a*) 1 California Statutes, p. 219. (*b*) Laws of 1853, ch. 180, p. 298.

The jurisdiction of the court of a justice of the peace extends to actions in the following cases, where the amount sought to be recovered is not more than $500:

Actions on contracts for the payment of money; for damages for injuries to the person, or for taking, detaining, or injuring personal property; for fines, penalties, and forfeitures, given by statute or the ordinance of an incorporated city; for the amount due on bond, no matter how high the penalty; for the instalments of a bond as each become due; for the foreclosure of a mortgage or lien on personal property; to recover possession of personal property, and to enter judgment by confession. In all these cases, the jurisdiction of a justice's court is perfect to the amount named, and in actions upon contracts for the payment of money, or foreclosure of a mortgage or lien on personal property, the amount named is exclusive of interest due, which is recoverable in the same action.(*a*)

These courts can try cases on all bonds and undertakings taken by themselves in the execution of their official duties, though the penalty or amount claimed exceed five hundred dollars; and actions of forcible entry; and forcible or unlawful detention of lands, tenements, or other possessions; but the justice's court of the county of San Francisco is limited to the sum of two hundred dollars, exclusive of interest, in all those cases where the amount is fixed at five hundred dollars.(*b*)

These courts can try the right to mining claims within their respective jurisdictions.(*c*) These courts also take cognizance of proceedings respecting vagrants and disorderly persons.(*d*)

The criminal jurisdiction of these courts, except the limits of the city of San Francisco, extends to petit larceny, assault and battery, if not committed on a public officer in the discharge of his official duties, or with intent to kill,(*e*) breaches of the peace, riots, affrays, wilful injuries to pro-

(*a*) Laws of 1853, ch. 180, p. 298.
(*b*) Ibid.
(*c*) Ibid. p. 299.
(*d*) Ibid.
(*e*) Ibid.

perty, and all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding three months, or by both such fine and imprisonment. As examining courts, their jurisdiction extends to crime committed within their respective counties; and as committing magistrates, to all criminals found within their respective counties, charged with the commission of a public offence within the state, and beyond the limits of their county.(*a*) These courts are limited in their jurisdiction in criminal cases, as regards the defendants, to persons residing in their respective townships or cities; but it is co-extensive with the county, when there is no justice in the township where the defendant resides, or one capable of acting in the matter.(*b*)

IN WHAT CASES A JUSTICE'S COURT HAS NO JURISDICTION.

These courts have no jurisdiction where it is necessary for the court, in deciding the case, to decide upon the title to real estate.(*c*) As where A. paid B. one hundred dollars, for a trespass done to B. by cutting timber, and afterwards A. discovered that B. had no right to the land on which A. cut the timber, and brought his action against B. to recover back the money.(*d*) Here it would be necessary, for the plaintiff to make out his case, to show no title in B. to entitle him to recover, and consequently a justice's court would have no jurisdiction.

These courts have no jurisdiction to foreclose a mortgage or enforce a lien on real estate, nor to actions for the recovery of money on contracts for more than five hundred dollars, exclusive of interest, or for personal property to greater value than for five hundred dollars, and for damages to person or personal property over five hundred dollars, and in the county of San Francisco for sums not over two hundred dollars. These courts have no jurisdiction in an action or proceeding against ships, vessels, or boats, or

(*a*) 2 California Statutes, p. 223.
(*b*) 2 California Statutes, p. 224.
(*c*) Laws of 1853, ch. 180, p. 299.
(*d*) 3 California Statutes, p. 163.

against the owners or masters thereof, when the suit or proceeding is for the recovery of seamen's wages for a voyage performed in whole or in part without the waters of this state.

The special jurisdiction of these courts extends to cases for injury to the person, or real or personal property; the action to be brought where the injury was committed, and where property is taken or detained, and the action to be brought in the township or city where the property is found or was taken. Where the defendant is a non-resident of the county, suit can be brought against him in the township or city where he may be found. Where the obligation and contract binds the defendant to perform it at a particular place, and he resides in another township or city, suit may be brought in the township or city where the same was to be performed, or the place where the defendant resides. Where a lien mortgage on personal property is foreclosed, the suit is to be brought in the township where the property is situated. Judgments by confession are to be entered up where the warrant specifies, and judgments may be entered up on the voluntary appearance of the parties without regard to their residence, or where the cause of action arose, or the subject matter may exist. Where two or more persons are jointly liable, or jointly and severally liable, on debt or contract, or otherwise jointly liable in the same action, and reside in different townships or different cities of the same county, or in different counties, the plaintiff may prosecute his action before one of these courts in any township or city where one of the persons liable may reside.(*a*)

RECORDER'S COURTS.

The jurisdiction of these courts is the same within their respective cities, as the criminal jurisdiction of the justices' courts.(*b*)

They are also examining courts and committing magistrates, and in addition to these cases their jurisdiction extends to all cases for the violation of the ordinances of their

(*a*) 2 California Statutes, 134, 135. (*b*) Laws of 1853, ch. 180, p. 300.

respective cities, to all actions to abate or prevent nuisances within the limits of their respective cities, and all proceedings respecting vagrants and disorderly persons.

MAYORS' COURTS.

When authorized by law to hold courts, they have the same jurisdiction, within the limits of their cities, as is by law conferred upon recorders' courts.(*a*)

PROBATE COURT.

The county judge of each county shall be the judge of the probate court. Laws of 1853, ch. 7, s. 62, p. 297.

The probate court shall have power to open and receive the proof of last wills and testaments, and to admit them to probate; to grant letters testamentary, of administration and of guardianship, and to revoke the same, for cause shown according to law; to compel executors, administrators, and guardians to render an account when required, or at the period fixed by law; to order the sale of property of estates or belonging to minors; to order the payment of debts due by estates; to order and regulate all partitions of property or estate of deceased persons; to compel the attendance of witnesses; to appoint appraisers or arbitrators; to compel the production of title deeds, papers, or other property of an estate or of a minor; and to make such other orders as may be necessary and proper, in the exercise of the jurisdiction conferred upon the probate court. Ib. s. 63.

The county judge shall have power in vacation to appoint appraisers, to receive inventories and accounts to be filed in his court: to suspend the powers of executors, administrators, or guardians in the cases allowed by law; to grant special letters of administration or guardianship; to approve claims and bonds, and to direct the issuance from this court of all writs and processes necessary in the exercise of his powers as probate judge. Ib. s. 64.

(*a*) Laws of 1853, ch. 180, p. 301.

THE COURT OF SESSIONS.

The jurisdiction of these courts extends to inquiries by the grand jury, of all public offences committed or triable in its county. In the county of San Francisco, to try all indictments found therein, and, in other counties, to try and determine all indictments found therein for public offences, except murder, manslaughter, arson, and such crimes as are punishable with death; to hear and determine appeals from the justices', mayors', and recorders' courts in cases of a criminal nature; but they have no jurisdiction to try indictments against a justice of the peace, or any of its members.(*a*)

The court of sessions, except in the counties in which a board of supervisors is established, shall also have power and jurisdiction in its county—

Frist. To make orders respecting the property of the county, in conformity with any law of this state, and to take care of and preserve such property.

Second. To examine, settle, and allow all accounts legally chargeable against the county, and to direct the levying such per centage on the assessed value of real and personal property in the county as may be authorized by law.

Third. To examine and audit the accounts of all officers having the care, management, collection, and disbursement of any money belonging to the county, or appropriated by law, or otherwise, for its use and benefit.

Fourth. To control and manage public roads, turnpikes, ferries, canals, and bridges within the county, where the law does not prohibit such jurisdiction, and to make such orders as may be necessary and requisite to carry its control and management into effect.

Fifth. To divide the county into townships, and to create new townships, and to change the divisions of the same, as the convenience of the county may require.

Sixth. To establish and change election precincts.

Seventh. To control and manage the property, real and personal, belonging to the county, and to receive by donation any property for the use and benefit of the county.

(*a*) Laws of 1853, ch. 180, pp. 294, 295.

Eighth. To purchase any real and personal property necessary for the use of the county: *Provided*, that the value of such real property be previously estimated by three disinterested persons, to be appointed for that purpose by the district court of the county.

Ninth. To sell and cause to be conveyed any property belonging to the county, appropriating the proceeds of such sale to the use of the same.

Tenth. To cause to be erected and furnished a court-house, jail, and such other public buildings as may be necessary, and the same to be kept in repair: *Provided*, that the erection of such court-house, jail, and other public buildings be let out, after one month's previous publication, in each case, of a readiness to receive propopals therefor, to the lowest bidder, who will give good and sufficient security for the completion of any contract which may be made respecting the same.

Eleventh. To ascertain and determine with a jury, or by consent of parties, without a jury, the just compensation to be made by the owners of private property taken for public use.

Twelfth. To do and perform all such other acts and things as may be requisite and necessary to the full discharge of the powers and jurisdiction conferred on the court. Laws of 1853, ch. 6, s. 55, p. 295.

When any bay, river, stream, creek, or slough separates two counties, the court of sessions of the county lying on the left bank descending such bay, river, stream, creek, or slough, shall have the jurisdiction of the same, so far as the control and management of the bridges and ferries are concerned, but all sums paid for licenses to construct any bridges, or to run any ferries over such river, stream, creek, or slough shall be divided equally between the two counties. Ib. s. 56.

COUNTY COURTS.

These courts have jurisdiction to hear and determine all civil causes appealed thereto, from a justice's, mayor's, or recorder's court in the county.

These courts have original civil jurisdiction in all actions

to enforce the lien of mechanics and others; in actions to prevent or abate any nuisance; of all proceedings against ships, vessels, or boats, or against the owners or masters thereof, when the suit or proceeding is for the recovery of seamens' wages for a voyage performed in whole or in part, without the waters of this state; and in proceedings in case of insolvency, and to review the proceedings of an inferior tribunal or office on the writ of certiorari; and they may issue writs of certiorari and mandate to such inferior tribunals and officers in the cases provided by law.(*a*)

THE SUPERIOR COURT OF THE CITY OF SAN FRANCISCO.

The original jurisdiction of this court extends to all civil cases in which the amount in controversy is over two hundred dollars, exclusive of interest, or which involves the title or possession of real property situated in the city of San Francisco, and is concurrent with the district court.

DISTRICT COURTS.

The jurisdiction of these courts is of two kinds, original and appellate.

Original extends to all civil cases where the amount in dispute exceeds two hundred dollars, exclusive of interest, and to all criminal cases not otherwise provided for. In cases involving the title of real property, and in issues of fact, joined in the probate court, their jurisdiction is unlimited.(*b*)

The appellate jurisdiction extends to reviewing upon appeal a final judgment of a county court, in an action or special proceeding commenced therein. And to reviewing, upon the appeal, any intermediate order involving the merits and necessarily affecting the judgment.

A judgment of the county court rendered on appeal from a justice's or recorder's court. A judgment of a court of sessions in a criminal action.

An order granting or refusing a new trial in an action or proceeding commenced in a county court, or in the court of

(*a*) Laws of 1853, c. 180, p. 292, 294. (*b*) Laws of 1853, c. 180, p. 289, *et seq.*

sessions, or which affects a substantial right in such action or proceeding. An order or judgment of a probate court in cases prescribed by statute.

The criminal jurisdiction of these courts extends to all cases of indictments for murder, manslaughter, or arson, except where the person indicted holds the office of district judge. And all cases of indictments against members of the court of sessions, or justices of the peace.(*a*)

THE SUPREME COURT.

The jurisdiction of this court extends to appeals in all cases where the matter in dispute exceeds two hundred dollars, where the legality of any tax, toll, or import, or municipal fine is in question, and in all criminal cases, amounting to a felony, on questions of law alone.(*b*)

The supreme court shall have jurisdiction to review upon appeal:

First. A judgment, in an action or proceeding commenced in the district courts, county courts, when the matter in dispute exceeds two hundred dollars, or when the possession of land or tenements is in controversy, or in the superior court of the city of San Francisco, or brought into those courts from another court, and to review upon the appeal from such judgment, any intermediate order involving the merits and necessarily affecting the judgment.

Second. An order, granting or refusing a new trial, sustaining or overruling a demurrer, or affecting a substantial right in an action or proceeding.(*c*)

This court may reverse, affirm or modify the judgment or order appealed from in the respect mentioned in the notice of appeal, as to any or all of the parties, and may set aside, confirm, or modify any or all of the proceedings subsequent to and dependent on such judgment or order, and may, if necessary or proper, order a new trial, when the judgment or order is reversed or modified. This court may make complete restitution of all property and rights lost by the erroneous judgment or order.(*d*)

(*a*) 2 California Statutes, 245.
(*b*) Laws of 1853, c. 180, p. 288.
(*c*) Laws of 1853, c. 2, s. 6, p. 288.
(*d*) Laws of 1853, c. 180, p. 289.

CHAPTER II.

PRACTICE IN THE COURTS OF CALIFORNIA.

By the laws of California, the distinction between courts of law and chancery, and the different forms of practice and the names of actions in those courts, as practiced in England and many of the states of this Union, are still swept away; and the practice and proceedings before our courts are rendered simple and easy, and brought to the understanding of the people.

There is but one form of action in civil cases.

The person having the right to redress against another, is the plaintiff, and the person from whom that is to be obtained is the defendant.

THE PLAINTIFF.

The action must be prosecuted by the real party in interest, except in cases of an executor or administrator; a trustee of an express trust, or a person expressly authorized by statute to sue. The father or mother of a child that has been injured or killed; the guardian of his ward, who has been injured or killed, and those who are united in interest, in the matter of the suit, should be joined as plaintiffs; but in case there are some who refuse, the rest can sue and make those who refuse to become party plaintiffs, party defendants with those who are the proper defendants, by charging the fact in the complaint. Where there is a question of common or general interest to many persons, or the parties are numerous and it is impracticable to bring them all into court, the action can be brought by one for the benefit of all. And in case of the death or other disability of the plaintiff, after the action has been commenced, the court is to allow the representative or successor in interest to prosecute the action; and in

case of the transfer of the plaintiff's interest in the subject matter of the action after the same has been commenced, the court on motion may continue the action in the name of the original party, or allow the assignee to be substituted in his place.(*a*)

THE DEFENDANTS.

Any person who claims an interest in the subject matter of the controversy, adverse to the plaintiff, may be made a party by the plaintiff, but all persons who have an interest in the controversy, adverse to the plaintiff, and who are necessary parties to a complete determination or settlement of the question involved in the action must be made parties. Where, however, the question is one of a common or general interest to many persons, and the parties defendants are numerous, and it is impracticable to bring them all before the court, one or more may defend for the benefit of all; and in cases where persons are severally liable upon the same obligation or instrument, the plaintiff may sue one or all, as he shall determine; and in case of the transfer of the interest in the subject matter of the action by one or all of the defendants, after the action is commenced, the action is to be continued in the name of the original party, or the court will substitute the assignee; and in case of the death or other disability of the defendant or defendants, the court on motion is to allow the representative or successor in interest to defend in place of the original party.(*b*)

AS TO MAKING NEW PARTIES BY THE COURT.

The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but in case a full and complete judgment of the court cannot be pronounced in the action without the presence of other parties, it is the duty of the court to order them to be brought in.(*c*)

(*a*) 2 California Statutes, 51.
(*b*) 2 California Statutes, 52.
(*c*) 2 California Statutes, 53.

OF THE COMMENCEMENT OF ACTIONS.

In the district courts, superior court of San Francisco, and the county courts, civil actions are commenced by filing with the clerk of the court before whom the petition is brought a document called the complaint, which should contain a description of the cause of action which the plaintiff has against the defendant.

In those cases where the plaintiff requires the answer of the defendant to be verified by oath, the complaint must be sworn to, [but in case the admission by the defendant of the truth of the fact set forth in the answer, would subject him to a prosecution for felony, the verification or not of the answer will be at the option of the defendant,] also when the action is founded on a written instrument upon which suit is brought, whether executed by the defendant or another individual. In actions prosecuted by a corporation, any of its officers can verify the complaint, and any person can verify on behalf of the state. In other actions, any person can verify for the plaintiff, in case he is absent or unacquainted with the facts, but that must be stated in the affidavit.

In actions for the recovery of real property the complaint must set forth the metes and bounds thereof; and in actions on judgments it is sufficient to state in the complaint, after describing the judgment, that it was duly rendered; and if the allegation be controverted, the plaintiff is bound on the trial to establish the facts conferring jurisdiction; and in all actions on contracts for the performance of conditions precedent, it is sufficient to allege that the plaintiff performed all the conditions of the contract on his part, and if controverted by the defendant's answer, the plaintiff shall establish on the trial the facts showing such performance; and where the plaintiff pleads a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and date of passage.

The plaintiff may include several causes of action in his complaint, and a recovery be had on one or all at one trial;

thus for example, a plaintiff having several causes of action against a defendant, growing out of contracts express or implied, such as amount due on a note, balance due on a bill of exchange, balance due on book account, amount due on contract for work and labor done: any or all of these may be included in one complaint.

Where the plaintiff seeks to recover real estate, and damage done the same, and waste committed thereon, and rents and profits for occupying it, one or all of these causes may be included in the complaint.

Where the plaintiff seeks to recover personal property, he may include in the complaint a claim for damage for withholding the same.

Where a recovery is sought by an individual having various claims against a trustee, growing out of a contract or by operation of law, one or all may be included in the complaint.

Where various injuries have been done to the plaintiff's character, one or all may be included in the complaint.

Where various injuries have been done to the person of the plaintiff, one or all may be included in the complaint.

And where various injuries have been done to the real estate of the plaintiff, these one or all may be contained in the complaint. But in drawing up the complaint, where more than one cause of action is contained in it, each cause must be as fully and fairly described as if there were but one, and it must be drawn in such a manner that the defendant will know what it is he is called upon to answer and defend.

For the purposes of the action, every material allegation contained in the complaint not expressly controverted by the answer, is to be taken as true, and judgment rendered accordingly.

After the complaint has been filed, the clerk is to issue a summons against the defendant in favor of the plaintiff.

The summons and copy of the complaint is to be served on the defendant personally, except where the action is against a corporation, then on the president thereof, or other head of the corporation, secretary, cashier, or managing

agent; if against a minor under the age of fourteen, on such minor personally, and also on his father, mother or guardian; or if there be none within the state, then on any person having the care and control of such minor, or with whom he resides, or in whose service he is employed; and if against a person who is judicially declared of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, then on such guardian.(a)

SERVICE BY PUBLICATION.

Defendants to an action may be brought into court by publication of the summons. In case where the person on whom the service is to be made resides out of the state or has departed from the state, or cannot after due diligence be found within the state, or conceals himself to avoid the service of the summons, the service of the summons is to be ordered by the court, by publishing the same in some newspaper, most likely to give the defendant notice of the pendency of the action, and for such length of time as the court shall deem reasonable, but the same must be published at least once a week; the facts of non-residence, departure from the state, or that the defendant cannot be found within it, after due search for him having been made, or that he conceals himself to avoid service of summons, and that there is a cause of action against him, must be made to appear to the satisfaction of the court by affidavit before the order of publication will be made. As against a non-resident of the state, or one who has absented himself from it, the publication must be made for not less than three months, once a week; and where the resident or non-resident defendant is known, in addition to the summons being published, the court is to order and direct a copy of the summons and complaint to be deposited in the post-office, directed to the defendant at his place of residence. In case the defendant is absent from or a non-resident of the state, personal service of copy of summons and complaint is, from the language of the law, a good

(a) 2 California Statutes, 55, 56, 57, 58, 59, 60, 61.

service; but, to prevent all cavil on the point, it is better to have an order for and publish the summons, in addition to the personal service. In all cases where the summons has been published for the time and in the paper named and directed by the court, and copy of summons and complaint deposited in the post-office as directed, the service is complete, and in forty days thereafter the answer of the defendant is due. In an action on a contract for the payment of money, instead of ordering a publication against a defendant, the court may appoint an attorney to act for him, or may order the summons published, and appoint an attorney too. In actions upon joint contracts, where one or more of the obligors have been served, but not all, the service is good against those actually served in the discretion of the court, and a judgment rendered upon such service is to operate on the separate property of him that has been served, and the joint property of all the obligors; and in an action where the defendants are severally liable on the contract sued, and service be made on part, proceedings may be had against those served as if they were the defendants only. A voluntary appearance of the defendant in court is equal to personal service of summons and complaint.(*a*)

WHERE THE ANSWER OF THE DEFENDANT SHOULD BE FILED.

If the defendant was served in the county where the action is brought, then his answer should be filed in ten days after the service, and if he has been served in the district where the action is brought, but out of the county, then his answer should be filed in twenty days after service, in all other cases forty days after service, made either personally or by publication. After service has been made the court has jurisdiction of the case, and if the defendant fails to make answer or appear, the court has the power to render judgment by default or take such proceedings in the matter as the justice of the case requires. But if the defendant appears within the time limited, he may answer or demur to the plaintiff's complaint.(*b*)

(*a*) 2 California Statutes, 55, 56. (*b*) 2 California Statutes, 57, 58, 59.

ANSWER.

The answer of the defendant must be one in good faith, and not a sham defence; all sham answers or defences made by a party, the court upon motion, will strike from the files and proceed as if they were not filed. The answer should controvert every material allegation in the complaint, by a general or specific denial thereof, or a denial according to his information and belief, or of any knowledge sufficient to form a belief. But in stating matter, it must be in counter claim of the defendant against the plaintiff arising out of or connected with the subject matter of the suit, or that which is a good cause of action, in favor of the defendant against the plaintiff, growing out of a contract and existing at the time of the commencement of the action, and the defendant may set forth in his answer as many defences and counter claims as he may have, but must do it separately. Where the complaint to which the answer is made is verified by affidavit, the answer must also be verified by the defendant, his agent, attorney, or other person; the verification is to be made by the party himself, unless he is absent or is not acquainted with the facts; in case he is not acquainted with the facts, then the verification is to be made by the person who is, and when it is made by any person other than the party himself, the reasons must be set forth in the affidavit; where a corporation is a party, an officer thereof, can verify, and where the state or an officer thereof in its behalf is a party, any person may verify who is acquainted with the facts.

Where the defence is founded upon a written instrument and a copy thereof is given, the genuineness and due execution thereof, will be deemed admitted, unless the plaintiff file with the clerk of the court five days before the commencement of the term at which the case is to be tried, an affidavit denying the same. But the allegation of new matter is to be considered and taken by the court as controverted by the plaintiff as upon a direct denial or avoidance.(*a*)

(*a*) 2 California Statutes, 56, 57, 58, 59, 60, 61.

DEMURRER.

The demurrer of the defendant should be filed within the time fixed for the coming in of the answer, and distinctly state the grounds upon which it is founded; if the grounds are not set forth showing what is the objection to the complaint, the court may disregard the demurrer and proceed with the case as if no demurrer had been filed. Where there are more than one causes of action contained in the complaint, the defendant may demur to one or more of them, and answer the rest, at the same time, or he may demur to all. The defendant can demur where the court has no jurisdiction of the person of the defendant, or the subject matter of the action. That the plaintiff has not legal capacity to sue, that there is another action pending between the same parties for the same cause. That there is a defect in the parties plaintiff or defendant. That several causes of action have been improperly united, that the complaint does not state facts sufficient to constitute a cause of action. Any other objection to the complaint may be taken advantage of by answer. If there is a defect in the jurisdiction of the court, or a want of facts, stated to constitute a cause of action, the defendant may take advantage of it on motion, at any time; all other objections to the complaint not demurred to, or made in the answer, will be considered by the court to have been waived.

Where the complaint is demurred to by the defendant, that forms an issue at law, which is to be disposed of before any further proceedings are had. If the decision is against the defendant he can pay costs and answer the complaint; then he makes an issue of facts to try which is the next step in the case.

When the complaint contains more than one cause of action, and the defendant demurs to some and answers as to the residue, the issue at law is to be disposed of before that of fact.(*a*)

(*a*) 2 California Statutes, 57.

TRIAL.

The court is to try the issue of law, unless the parties shall refer the trial of the same to one, two, or three referees, who are to report their judgment thereon to the clerk of the court within ten days after the trial and judgment, to be entered accordingly; the agreement of the parties to make the reference is to be reduced to writing and filed with the clerk or entered in the minutes of the court; the issue of fact is to be tried by a jury, unless waived by the parties.

The parties can waive a jury, by referring the trial of the issue of fact to the decision of one, two, or three referees; the agreement of reference to be filed with the clerk or entered in the minutes of the court; and if the parties do not wish the issue of fact to be tried by a jury or by referees, they can waive the jury and allow the court to try it; if the court tries it, its decision is to be reduced to writing, giving the conclusion on the issue of fact and law separately, within ten days after trial and the same is to be filed with the clerk, upon which judgment is to be entered accordingly.

In case the parties refer the issue at law and no more to the decision of referees, they are to make their decision and report the same to the court within ten days after trial, and judgment thereon, to be entered up as if the decision had been made by the court.

If the decision is against the defendant then the defendant is to pay costs and file his answer making an issue of fact, or judgment will be entered against him on the merits; but in case the answer is filed forming the issue of fact, then the trial of that issue is to be either by the jury, referees, or the court. The decision or judgment of referees on the law or facts of a case, is to be treated and have the same effect, as if done by the court. The clerk is to enter up the judgment on the coming in of the report, and it may be excepted to and reviewed as if made by the court.

The court without the concurrence of the parties can refer a case for decision to one, two, or three referees, where there is a long account on either side for examination, and it may refer any question of fact involved in the case, or may refer

the taking of an account for the information of the court, to enable it to enter judgment or an order in the case and may refer a question of fact, that shall arise in the progress of the case, other than the issue made by the pleadings; and when in a special proceeding before the court a question of fact shall arise, a decision of which is necessary for the information of the court, it may be referred for decision to a referee or referees.

TRIAL BY JURY.

If the parties do not agree to refer the trial of the issue of fact to a referee or referees or to the court, and from the character of the case, the trial of the issue of fact is not referable by the court, or if referable is not so done, then the trial is to be before a jury.

In case the jury is not reduced in the number by the agreement of parties, then the parties on each side are entitled to four peremptory challenges each, and as many challenges for cause as may occur.(*a*) If a juror is not a citizen of the United States or an elector of the county, and is not over twenty-one or under sixty years of age, or in the full possession of his natural faculties or if he has ever committed felony or a misdemeanor involving moral turpitude, or is related within the third degree to either party, or is standing in the relation of guardian or ward, master or servant, principal or agent to either party, or if he is a member of the family of either party, or a partner in business of either party, or is security on any bond or obligation for either party, or has served as a juror or was a witness for either party, on a previous trial between the same parties for the same cause of action, or has an interest in the event of the action or the main question involved in the action, or has formed and expressed an unqualified opinion as to the merits of the action, or has enmity or bias, for or against either party, any of these objections, is a good cause for a challenge; the juror challenged or any person else may be examined as a witness on the trial of the challenge.(*b*)

(*a*) 2 California Statutes, 75, 76; 3 California Statutes, 107, 108.
(*b*) 2 California Statutes, 76.

When the jury is completed and in their seats, the oath of affirmation is to be administered to them by the clerk or judges, and then commences the trial.

In the event of a juror becoming sick after the jurors are sworn and before the verdict, the court may if he is unable to perform his duties discharge him; then the trial is to proceed with the rest, if the parties consent to it; if they do not consent, then the jury will be discharged, and another will be formed at that or another time.

The charge to the jury by the court is to be on matter of law applicable to the case, the court being the judge of the law and the jury of the facts, and where the court comments upon the facts he is to state to the jury that they are the judges of the facts of the case.

The jury may decide in court or retire for deliberation; if they retire, it is to be under the charge of an officer, who is not to allow any person to communicate with them, nor do it himself, further than to ask them if they have agreed upon their verdict, unless directed by the court, nor is he to communicate to any person the state of their deliberations or their verdict, before it is rendered to the court.

All papers admitted as evidence, except the depositions read in evidence are to be given to the jury before they retire; they can use all notes made by them or either of them during the trial, but cannot use the notes or statements taken by any other person; in case there are any papers which the court should think ought not to be used before the jury for fear of loss to the owner, then the court is to order copies of such papers to be given the jury; during the retirement of the jury, the court may adjourn and direct the jury to bring in their verdict sealed on the meeting of the court again, in case they have agreed to one; when they have agreed on their verdict they are to be conducted into the court by the officer having them in charge; then the court or clerk will ascertain from the foreman of the jury if they have agreed on their verdict. If they have so agreed and the verdict is not informal or insufficient, the clerk is to enter it in full on the minutes, and read it to the jury and inquire of them whether it is their verdict; if none disagree,

then it is to stand as their verdict, and they are then to be discharged. But in case the verdict is informal or insufficient in not covering the whole issue or issues submitted, the jury may correct the same in the presence of the court, or may retire again to make up their verdict, and in case any shall disagree to the verdict when read to them by the clerk, they are again to retire to make their verdict.(*a*)

VERDICT.

The court at any time before the jury retire may direct them to find a special verdict which is to decide certain questions of fact submitted to them by the court and which arise in the case. From the conclusions arrived at by the jury, the court is enabled to apply the law and render a judgment in the case. Unless the jury shall be so instructed to find a special verdict, they will proceed and find a general verdict, which is pronouncing judgment on all the issues of fact in favor of the plaintiff or defendant.

In all actions for the recovery of money where the defendant in his answer sets up a counter claim for the recovery of money, and the jury find the amount established in favor of the plaintiff, upon the claim or claims set forth in the complaint, and the amount so found is less than the amount they find in favor of the defendant, then in those cases the jury is to find the amount due to each party in the case, as well as the exact balance in favor of the defendant after deducting the amount found in favor of the plaintiff; and in all cases for the recovery of specific personal property, the jury by their verdict are to ascertain whether the property has been delivered to the plaintiff in pursuance of the proceedings in the action; if it has been delivered to him and he is entitled of right to it, they are so to find, and in case the plaintiff claims damages for the taking and detention of the same the jury are to assess the amount in their verdict, and in case the property was not given up to the plaintiff according to law but retained by the defendant, and the jury find the plaintiff was entitled to the property, they will so determine, and

(*a*) 2 California Statutes, 76, 77, 78.

then find and determine the value of the property, and if damages are claimed in the complaint for the taking and detention, they will assess the same.(a)

In case the defendant shall retain the property and the jury shall determine he was entitled to it, they will so render their verdict.

But in case the defendant delivered the property to the plaintiff according to law, and the defendant in his answer denies that the property is the plaintiff's, and claims damages for its taking and detention, then the jury are to find the value of the property and damages for the taking and detention.(b)

EXCEPTIONS.

Exceptions may be made by either party at any time during the trial.

The exception may be reduced to writing and delivered by the party to the court, or taken down by the clerk, or entered on the minutes of the court. The objection when entered by the clerk or written down and handed to the court must be conformable to the truth and made so to the satisfaction of the court at the time.

The exception must be stated with sufficient facts and circumstances, so as to show the point of objection clearly, and unless the exception is material and affects the substantial rights of the party making it, it will avail him nothing as it cannot be urged, and the court will not regard it on motion for a new trial or on appeal.(c)

ENTERING UP JUDGMENT.

When the verdict of the jury has been rendered and recorded, judgment is to be entered up in conformity with the same within twenty-four hours after the rendition of it, unless the proceedings are stayed by the court, for further argument or consideration, and when that is done either party can bring it up for argument at the next special term.

(a) 2 California Statutes, 78.
(b) 2 California Statutes, 78.
(c) 2 California Statutes, 80.

If a counter claim in favor of a defendant be established by the verdict of a jury, judgment is to be rendered in favor of such defendant, for the balance found by the jury and such other relief as the defendant may be entitled to.

In case of the recovery of specific personal property the judgment is to follow the verdict of the jury as to the rights of the parties. If the verdict is in favor of the plaintiff and the property was not and cannot be delivered to him, then the judgment is to be for the value of the property, and damages for the taking and detention, if they are claimed in the complaint. Where the property was delivered and the verdict is for the defendant, then, if the property cannot be returned to the defendant and in his answer he claims damages for the taking and detention of it, the judgment is to be for the value of the property, and damages for the taking and detention thereof. But where the property can be delivered and is not in the possession of the successful party, the judgment is for its delivery, together with damages for the taking and detention of it, if damages are claimed. If either party die after verdict and before the judgment, the judgment is nevertheless to be entered up, but the same is not to operate as a lien on the real property of the deceased.(*a*)

JUDGMENT BY CONFESSION,

May be entered on a statement being filed in court showing the liability, and verified by oath; the judgment must be for the sum specified. If the debt is to become due, the statement must so describe it; if the debt is a contingent one in favor of the plaintiff and the judgment taken to secure him, the facts constituting the liability must be shown in the statement, and the amount the judgment is taken for must not be greater than the liability.

Judgment may be entered where the parties submit to the court a statement of the case containing the facts, upon which the controversy depends, the statement to be verified by oath, the court is to hear and determine the case, as if an

(*a*) 2 California Statutes, 82.

action had been brought and was pending, and judgment entered up as in other cases.(a)

JUDGMENTS BY COURTS OF APPEAL.

The appellate court may reverse, affirm, or modify the judgment or order appealed from, and the judgment or order may be so reversed, affirmed or modified as to any or all of the parties, and it may set aside or confirm, or modify any or all of the proceedings subsequent to or dependent upon such judgment or order; and it may if necessary or proper order a new trial, and when the judgment or order is reversed or modified, the appellate court may order and direct complete restitution of all property and rights lost by the erroneous judgment or order; and when it appears to the appellate court that the appeal was made for delay only, it may add to the costs such damages as may be just and equitable.

NEW TRIAL.

Courts are required to grant new trials to a party applying therefor, in all cases where it shall appear to the court, that in the progress of the trial an erroneous decision of a question of law has been made by the court, jury, or referees against the party making the application, so that he did not have a fair trial.

Misconduct of the jury;

Accident or surprise against which ordinary prudence could not have guarded against;

Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

Excessive damages appearing to have been given under the influence of passion or prejudice;

Insufficiency of the evidence to justify the verdict or other decision; or that the judgment or decision is against the law;

(a) 2 California Statutes, 111.

If a party intends to move for a new trial he must give notice of the same, within two days after trial; this notice should be given in writing and served on the opposite party or his attorney, in or to the opposite party or his attorney, or served upon either and entered on the minutes of the court; and in case the motion is founded on the fact that there has been irregularity in the proceedings of the tribunal in trying the case; misconduct on the part of the jury; accident or surprise or newly discovered evidence; then the party must within five days after notice given, state the grounds on which the motion is founded, verified by affidavit. But where the motion is founded on the fact, that the judgment or decision is against law, or that the evidence was insufficient or the damages excessive, having been given under the influence of passion or prejudice, or that the tribunal in trying the case erred in deciding a material question of law which is excepted to by the party, then the party moving for a new trial shall make out a statement of the grounds on which he relies, and file the same with the clerk within five days from time of service of notice; and the party making the statement, if his motion is founded on any part of the evidence must incorporate so much of it as is necessary to explain the grounds taken, and apply to the opposite party or attorney to agree that the evidence he has included in his statement is true; but if that is not agreed to by the opposite party and the statement cannot be made, so that he will agree to it and yet answer, then the next step to be taken is to give him notice that application will be made to the court to have the statement so far as regards the evidence referred to sanctioned by the court. Notice of the time and place of the application should be given to the opposite party that he may be present to urge anything against the statement so made out; the court after hearing the parties will sanction or modify the statement to suit the evidence referred to.

In case the application is of such a character that affidavits are filed upon which the motion is grounded, then the opposite party may file with the clerk counter affidavits one day before the hearing of the motion.

After the filing of affidavits or statement, application is to be made by the party applying for the new trial, and the court is to hear it, at the earliest period practicable.(a)

APPEALS FROM JUSTICES', RECORDERS' AND MAYORS' COURTS.

In civil actions appeals may be taken from judgments in these courts by either party to the county court. There may be tried anew in the county court, judgments in all civil cases rendered by justices', recorders' and mayors' courts.(b)

APPEALS FROM PROBATE COURTS.

An appeal may be taken from these courts to the district court of the district in which the probate court is held and will lie from a judgment or decree admitting or refusing a will to probate, from an order setting apart property or making an allowance to the widow and children.

From an order granting letters testamentary or of administration, or appointing a guardian of any infant, or of insane person, or of a person incompetent to manage his property, or refusing to grant such letters, or to make such appointment, or making such letters or appointment; from an order directing the sale or conveyance of real property; from all orders admitting or refusing will to probate, or determining the validity thereof; and from all orders setting apart property or making allowances to widow, child, or children.

From an order or decree by which a debt, claim, legacy, or distributive share is allowed, or payment thereof directed or by which such allowance or direction is refused: from an order made on the settlement of an executor, administrator, or guardian: and all orders revoking letters testamentary or administration, and all orders, allowance, decree, rule or decision made by the court or judge. The appeal is to be taken within thirty days after the order or decree appealed from is entered with the clerk; and the manner of effecting it in reference to the statement of the case, notice and

(a) 2 California Statutes, 81.

(b) Laws of 1853, ch. 178.

undertaking, is the same as in appeals from the district courts to the supreme court.(*a*)

COUNTY COURTS.

Appeals lie from these courts to the district courts in favor of either party;

From a final judgment rendered in an action or special proceeding commenced therein.

From a judgment rendered on an appeal.

From an order granting or refusing a new trial, or which affects a substantial right in an action or special proceeding.

The undertaking, notice, statement, &c., are the same as in appeals to the supreme court from the district courts.(*b*)

Causes on appeal are to be tried anew in the appellate court.(*c*)

APPEALS FROM DISTRICT COURTS, AND SUPREME COURT OF SAN FRANCISCO.

Appeals lie from the district courts and supreme court of San Francisco to the supreme court.

Either party may appeal from the judgment rendered in an action or special proceeding commenced in those courts or brought there from another court. And from an order made at a special term, granting or refusing a new trial, or which affects a substantial right in an action or special proceeding. When the appellant wishes a statement of the case to be annexed to the record of the judgment or order appealed from, it is necessary for him to make out such a statement, which statement is to contain the grounds on which he relies on the trial of the appeal, and so much of the evidence as may be necessary to explain them.

This statement is to be made out and a copy of it served on the opposite party within twenty days after the entering of the judgment or order appealed from.

(*a*) 2 California Statutes, 486.
(*b*) 2 California Statutes, 108.
(*c*) Laws of 1853, ch. 178.

If the statement thus made by the appellant is acceptable to the respondent he is to sign the same with the appellant, and then it becomes part of the case and is annexed to the record of the judgment or order appealed from.

But if it does not suit him he can within five days after service of it upon him, make out amendments to it and serve a copy on the appellant, then if the amendments are acceptable to the appellant the parties amend the statement accordingly and sign it; and have the same appended to the record of judgment or order appealed from; but in case the amendments are not acceptable to the appellant he must give the respondent two days notice that he intends to present the statement and amendments to the judge who tried and heard the case, to have the same settled by said judge. When the time limited by the notice arrives the appellant is then to present the statement and amendments to the judge, who is thereupon to proceed and settle what is the true statement, after which it is to be put in form, and then he is to certify that the same is allowed by him, and is correct, and when signed by him it is to be annexed to the record of judgment or order appealed from. The time limited for the statement and amendments to be made, may be enlarged by order of the court on good cause shown.

But when the appeal is taken from an order made at a special term upon affidavits filed, the affidavits are to be annexed to the record of the order instead of such statements.

To perfect the appeal, the appellant is to file with the clerk of the court where the judgment or order appealed from is entered a notice to the opposite party, stating the appeal from the judgment or some specific part thereof; and service on the respondent or attorney, with copy of same and within five days thereafter the appellant is to file with the clerk of the court, an undertaking executed by himself, and at least two sureties stating their places of residence and occupation, on one or several instruments as the appellant shall determine, in the sum of three hundred dollars to the effect that the appellant will pay all damages and costs that may be awarded against him in the appellate court,

and in case of his failing to do so that they will pay for him on account thereof a sum not exceeding three hundred dollars; but in case the appellant shall see proper to deposite three hundred dollars in place of the undertaking to abide the event of the suit he can do so.

Where the judgment or order from which the appellant takes the appeal directs the payment of money, and the appellant shall wish a stay of the execution of such judgment or order, the undertaking is to be for an amount double that of the judgment or order, and to the effect that the appellant will pay the judgment or order appealed from in case the judgment shall be affirmed by the appellate court; but that if the judgment shall be determined, then that the appellant will pay such part, or on the failure of the appellant to do so that the undertakers will pay the same, or on account to the amount named in the undertaking.

Where the judgment or order directs the delivery or assignment of documents or personal property to stay the execution of the judgment or order, the appellant is to file an undertaking with two good securities in such amount as the court from which the appeal is taken, or the county judge may fix and determine to the effect that the appellant will obey the order of the appellate court, upon the appeal, or on his failure to do so that they will pay on account thereof the sum named in the undertaking.

Where the judgment or order from which the appeal is taken directs the sale or delivery of possession of real property to stay the execution of the judgment or order, the appellant is to execute an undertaking with two sureties, in such sum as the court rendering the judgment may fix, to the effect, that during the possession of said property by the appellant, he will not commit or suffer to be committed any waste thereon, and that in case the judgment be affirmed by the appellate court he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order of the appellate court; but on failure of the appellant, that the undertakers will pay on account of the waste and use and occupation the sum named in the undertaking.

When the judgment or order from which an appeal is taken is for the sale of mortgaged premises and the payment of a deficiency, arising upon the sale to stay the execution thereof, the undertaking is to provide for the payment of such deficiency.

CHAPTER III.

PRACTICE IN THE PROBATE COURTS.

THIS court by law, has charge of the estates of deceased persons, and those incompetent to manage them, and control and charge of the persons and estates of minors, and those who are insane. The practice of the court is the same as that of the district court, varied only where the nature of the business requires it.

The proceedings of this court are those in term and those out of term, all of which must be recorded in the minute book of the court, and at the end of each term signed by the judge.

Those authorized to be made out of term are orders necessary for the probate of a will and to compel its production, for granting letters testamentary and administration, for granting letters guardianship, all citations, orders, decrees and attachments, to compel new bonds, new sureties, or additional surety, given by executors, administrators or guardians, orders appointing appraisers of estates; all orders for citations against persons charged with embezzling money property or effects of an estate, and all orders for citation against persons who are charged with having money, goods, chattels, bonds, accounts, or other papers belonging to an estate, which came to his possession, and held in trust for the executor or administrator, and to render account thereof, and his proceedings in relation thereto, all orders making allowance for widow and child or children, until letters upon the estate are granted; all orders allowing or rejecting claims against estates, all orders to compel a surviving partner of the deceased to settle with the executor or administrator, all orders for citations against guardians, executors, or adminis-

trators, to show cause why they should not exhibit their accounts and vouchers, and to show cause after they have been exhibited why they should not settle them, all orders for citations, to show cause why they should not be attached and committed to jail, for not so exhibiting their accounts and vouchers, or settling the same; all orders of attachment and commitment for failing so to exhibit, or settle their accounts, all orders of citation, attachment and commitment to jail against guardians, executors, or administrators, to compel them to answer under oath touching their proceedings as such guardian, executor, or administrator, all orders to suspend guardians, executors, and administrators, for wasting, embezzling, or until investigation is had of the matter, and all orders necessary to appoint a special administrator for such estates during the suspension, all orders to compel such suspended guardians, executors, or administrators, to appear and answer under oath in regard to their proceedings. All other proceedings of the court are to be done in term time, or at a special term appointed by the judge for that special proceeding.(*a*)

All writs and orders ordered by the judge or court are to be issued by the clerk, signed by him and authenticated with the seal of the court, except subpœnas, the seal to them not being required. All notice given to parties is to be by citation, briefly stating the nature of the proceeding unless ordered to be done differently by the court. The citation or notice is to state the time and place the party is required to appear before the court. Service of the citation, unless otherwise directed, is to be at least five days before its return, and is to be served by copy of the writ delivered to the person required to be served with it.(*b*)

SETTLEMENT OF ESTATES.

A person may alter the descent and distribution of his estate by will, and the estate is to be settled according to the

(*a*) 2 Cal. Stat, ch. 124, p. 448. (*b*) 2 Cal. Stat., ch. 124, p. 448.

will. If no will is made, then the estate is to descend and be distributed according to law.(*a*)

Where a will is made and an executor named who is twenty-one years of age, and is not incompetent from habits of drunkenness, improvidence, or want of understanding, or convicted of an infamous crime he is entitled to execute the will, and settle the estate, but before he can commence the execution of his trust, the will is to be proven and admitted to probate, and the executor is to give bond to the state, with two or more sufficient securities to be approved of by the probate court, in a sum double the amount of the estate; but if the will dispenses with a bond from the executor, the court is to do so also, unless it appears necessary, and then it is to be required by the court as in other cases. When there are several executors, each is to give a separate bond.(*b*)

WILL.

A will is valid when made by persons over the age of eighteen years, of sound mind, and may extend to the disposition of the whole of the testator's property, both real and personal.

A sailor or mariner in actual service may dispose of his personal property by a nuncupative will, if made during such service. Any other person may dispose of five hundred dollars of an estate by such will, if it is made at his or her dwelling, and during their last sickness, or at a place where they had resided for ten days or more, or where they had been taken sick from home and died before their return; but such nuncupative will to be valid, must be witnessed by two witnesses who were present at the making, and the testator or testatrix must bid some one present to bear witness that such was his or her will, or to that effect. Wills of other persons and in all other cases must be reduced to writing, and signed by the testator or testatrix or some person for

(*a*) 2 Cal. Stat., p. 453, sec. 42. (*b*) 2 Cal. Stat., p. 448, ch. 124.

them, in their presence and by their express command, and attested by two or more competent witnesses, who subscribed their names as such in the presence of the person making the will.

A married woman cannot make, alter, or revoke a will, unless by the written consent of her husband endorsed upon the same, except in cases when by marriage contract she has the right. Her wills must be reduced to writing and witnessed as others are.

All beneficial devises, gifts, or legacies given by the will to a subscribing witness are void, unless the will can be proved by two other witnesses.

Where by the will not being proved, a part of the testator's estate would descend to the witness, the witness is competent, and the share equal to the gift, devise, or legacy, is to be paid the witness by the executor.

A will may be revoked by burning, cancelling, or obliterating the same by the testator or some person for him in his presence, or by some other will, codicil, or instrument of writing executed and witnessed as a will.

The will of a feme sole is revoked by marriage. The will of a single man is revoked by marriage, unless his wife is provided for by marriage contract, or provided for in his will, or mentioned in his will in such manner as to show an intention not to make any provision for his wife.

A bond covenant or agreement made after the execution or publication of a will to convey any property devised will not revoke it, the parties taking such instrument is left to his remedies against the legatees, as if the property had been inherited by them as heirs; so too a charge or incumbrance put upon any portion of an estate after it was devised, does not operate as a revocation, but the devise is to pass to the legatee, and the charge or incumbrance is a charge or incumbrance upon the whole estate. If after the execution and publication of a will a child is born to the testator or testatrix, and no provision made therein, the will is not revoked, but the child is entitled from the legatees, to the

share of his or her parents' estate, as if no will was made, unless it is apparent from the will that the parent intended to make no provision for such child.

And where no provision is made by the parent for his child, or the issue of his deceased child in the will, and from the will it is not apparent that such omission was intended, the child or issue thereof is entitled to share in the estate of the parent as if no will was made.

Where the testator shall name a debtor his executor, it does not extinguish the debt but must be settled for as other moneys in his hands, and the bequest of the liability of the debtor, does not operate as against creditors, if there should not be assets enough without it to satisfy them, and such bequest is to be considered as any other.(*a*)

Where a bond, covenant or agreement is made after the will, or a charge or incumbrance is put upon any part of the estate devised by the will, or no provision is made for children born after making the will, or no provision is made for those born or their issue, the damages for breach of the contract, or charge or incumbrance is to be taken from the estate not disposed of by the will, if any, but if none or not sufficient, then the legatees, in proportion to the value of their legacies, are to respond to or pay the same unless the obvious intention of the testator or testatrix would be defeated, if so then the specific legacy must be exempted from such proportional payment.

If a child or children, or their descendants are not named or provided for in the will, and have received in the life time of the parent, by way of advancement, money, or property, equal to their share of the estate, they are to have nothing from the estate.

Whenever any estate is by will devised to a relation of the testator or testatrix, and the devisee dies before the testator or testatrix the descendants of such devisee or legatee take the estate.

All devises of real property are to be construed, so as to transfer all the interest that the devisor had to the property

(*a*) 2 California Statutes, p. 461, sec. 109.

to the devisee, unless it clearly appears from the will that he intended to pass a less estate.

All property acquired after the making of a will is to pass by it, if it clearly appears from the will that such was the intention of the testator or testatrix.

All wills made in any other state of the union, or in a foreign country, to be valid and operate on either real or personal property in this state, must be made in the manner pointed out.

A will made out of the state by a married woman who makes it under a contract of marriage, if the contract is valid where the will is made, and by it the husband gives the authority to her to make a will, then if it is made in conformity with the directions given, it will operate to transfer property in this state, either real or personal, but if the wife has no such power given her by her contract with her husband, his written consent is necessary.(*a*)

PROBATE OF WILLS.

Proof taken and probate entered of all wills by the probate court of the state where a person resided at the time of his death, whether he died at home or elsewhere, and shall have made a will, proof, and probate of the same is to be made before the probate court of the county.

Where a person may die out of the state and has no residence in it, but has property in it, and shall have made a will, the proof and probate of his will is to be before the court of the county where any of his property may be situated; when a person shall have property in the state, being a non-resident, and shall die in the county where some or all of his property is situated, the court in the county where he dies is to take proof and enter probate of his will, if he made one; but if such person shall have died in a county other than the one where his property is situated the latter is to take the proof and probate of his will. Where a person that is possessed of

(*a*) 1 California Statutes, 177 to 179.

property in different counties of the state, and is not a resident of the state, shall die out of the state, and shall have made a will, proof and probate of it may be by the court of any county, and the court before which application is first made has exclusive jurisdiction in the matter. Where the probate judge is a witness to a will, executor or trustee, legatee or devisee, probate of it cannot be made by such judge, nor can he grant letters testamentary to the executor, or letters of administration with the will annexed; where that is the case, the probate court of the adjoining county has jurisdiction.(*a*)

PRODUCTION OF WILLS.

The person having possession of a will is to deliver the same to the probate court that may have jurisdiction of the matter, or to the executor named therein, within thirty days after he shall know of the testator's death. The same rule applies to an executor who has a will in his possession. Any person who fails to comply with the rule is liable to the parties interested in the will to the extent of the damages sustained by reason of the non-production of the will, and if any person having the possession of a will, fails to deliver the same within the time limited, then the court on petition being filed by the executor named in a will or any person interested in it, for that purpose may order the will to be produced at a time to be named in the order. A copy of the order is to be served on the person having the will; if after service of the order he refuses to deliver the will, the court may issue a warrant and have him committed to the jail, and kept in confinement until the will is produced. Application for all orders for the production of a will may be made to the judge out of term, and he may make and enforce them also out of term time.(*b*)

(*a*) 2 Cal. Stat., 48, 249, 250, 251, 252.

(*b*) 2 Cal. Stat., 449.

PROOF OF A WILL.

The court having jurisdiction of a will, and the same being in his possession, may appoint any time for its proof, not less than ten nor more than thirty days, and shall cause notice thereof to be published twice a week in some paper published in the county, but if no paper is published in the county, then by written notices posted up in three public places in the county, and in addition to the notice thus to be given, citations are to issue to the heirs of the testator residing in the county, if any, and to the executors named in the will, if they have not as yet applied for letters testamentary, and also subpœnas for the subscribing witnesses, at the time appointed for the proof of the will or any other time to which it may be construed. Notice having been given, proof of it is to be made, and evidence of the service of the citations taken, after which the court is to ascertain if any person interested in the will whether minors or others, are non-residents of the county, if so, the court is to appoint some attorney who will act for and represent them in the matter, and further to ascertain if any person contests the proof and probate of the will. If no contest of the proof and probate of the will is made, the court is to proceed and take the proof of one of the subscribing witnesses to the will, which is to be reduced to writing and signed by the witness. If the witness shall testify that the will was executed by the testator in the manner pointed out, and was of sound mind and under no restraint at the time, the court is to admit the same to probate. The court is then to attach to the will a certificate that it has been proven, signed by the judge and attested by the seal of the court, which together with the testimony taken, is to be filed with the clerk, who is to record them in a book provided for that purpose.

But if the proof and probate of the will shall be contested, which can be done by any person interested in it, by filing a written statement of the grounds he does it upon, and filing the same with the court, then the court upon the will being contested is to require all the subscribing witnesses to the

will in the county to appear and testify touching the same; their death, absence or insanity, will excuse them, but the disability must be made out satisfactorily to the court by proof before he will proceed without their testimony; if none of the subscribing witnesses reside in the county, or are excused from testifying the court may admit the evidence of other witnesses as to the surety of the testator, and execution of the will or of the testator's handwriting, or of that of the witnesses or one of them, the testimony to be reduced to writing and signed by the witnesses who shall give it. If upon hearing the proof and allegation of the parties the court shall be of opinion that the will was executed by the testator and at the time he was under no restraint, and of sound mind, and the will is executed as pointed out, the will is to be entered of probate, and the certificate attached to the will, which together with the testimony is to be filed with and recorded by the clerk. In this way wills are to be proven and entered of probate, after which letters testamentary may issue to the executor or executors, or letters of administration with the will annexed may issue to an administrator; but before we proceed to state how that is done we will consider the effect of such proof and probate of the will.(*a*)

HOW PROOF AND VALIDITY MAY BE CONTESTED.

The proof and validity of a will may be contested at any time within twelve months after the decease of the testator by any person interested in it. To do it the person must file in the court where probate of it was made, a petition in writing containing his allegations against the validity or sufficiency of the proof of the will and praying that probate thereof be revoked. Upon that being done a citation is to issue to the executor or administrator, as the case may be, and to all the legatees named in the will residing in the state, or to their guardians, if they are minors and have guardians, or to their personal representatives if any are dead, requiring them to appear at

(*a*) 2 California Statutes, 449 to 452.

some regular term of the court, to show cause why the probate of the will should not be revoked.

At the time appointed for showing cause or at any time thereafter to which it may be construed, personal service of the citations having been made and evidence of it given to the satisfaction of the court, the court is to ascertain whether there are any minors served with citation who have no guardians, if so then the court is to appoint some attorney who will act for them in the matter. Then the court is to proceed and hear the proof and allegations of the parties, after which if the court shall think the will valid and the proof was sufficient he is so to decide confirming the probate dismissing the petition and rendering judgment against the petitioner for the costs; but if the will from some cause is invalid or the proof was not sufficient, the probate is to be revoked and judgment against the legatees for the costs to be paid out of the estate. The revocation of a probate of a will suspends the powers of the executor or administrator, but no liability attaches to them on account of their acts previous thereto, done in good faith.

If the validity of a will or the proof of it is not so contested, before the proof taken or within the year thereafter, the validity of the will and sufficiency of proof thereof is conclusive as to the rights of all persons, except as to infants, married woman, and persons of unsound mind; they and each of them have one year after their disabilities are removed to contest the same.(*a*)

PROOF OF LOST WILLS.

The proof of the execution of a lost will is the same as one in existence. But before entering upon the proof of the execution of it, it must be satisfactorily proven to the court that it was in existence at the death of the testator, or fraudulently destroyed in his life time, and its provisions must be clearly and distinctly proven by at least two credible witnesses. During the pendency of the application to prove the

(*a*) 2 California Statutes, 450.

lost will, the court is to restrain the executor appointed under another will, if any, or an administrator if any have been appointed, from any acts that would be injurious to the legatees under the lost will. In case the proof of the loss of the will and the contents is made to the satisfaction of the court, then the proof of its execution is to be taken. If duly executed the contents or provisions of the will are to be clearly stated, and certified by the court, under the hand of the judge and seal thereof.

The certificate of the proof of the will, together with its provisions and testimony taken is to be filed with the clerk and recorded as in other cases.

The proof of these wills is subject to be contested as other wills.(*a*)

PROBATE OF FOREIGN WILLS.

A foreign will executed according to the laws of this state may be proved and probate taken according to the laws of the state or country where made, and a copy thereof may be filed in the probate courts of the county in this state, in which the testator was possessed of any property, but to give it force and effect, the copy of the will and probate duly authenticated is to be filed by the executor or person interested in the will, upon which the court is to appoint a time for its hearing, and have notice given as required to be done in other cases, and in like manner and effect the validity and proof of it are subject to be contested.(*b*) Whether contested or not, if the court shall be of opinion that the instrument is the will of the testator, a copy of the will and probate is to be filed with the clerk who is to record the same.(*c*)

LETTERS TESTAMENTARY OR ADMINISTRATION.

If the executor is entitled to execute the will, bond is to be taken from and letters given him. Objections may be

(*a*) 2 Cal. Stat., 452.
(*b*) 1 Cal. Stat., 177, 178, 179.
(*c*) 2 Cal. Stat., p. 451, sec. 27 to 36.

made to granting letters testamentary to the executors named in the will or any of them, by any person interested in the will. The objection is to be in writing and filed with the court authorized to grant the letters, and the court is to hear and determine them. If the executor named in the will is a minor the court is to appoint an administrator with the will annexed during the minority of the executor, and after his arrival at age he may give bond and receive letters testamentary and proceed and discharge the trust in place of the administrator *durante minore*. And where there are two executors named in the will and one is a minor the other may give bond and receive letters and act alone until the minor shall become of age, and when the minor shall become of age and give bond and receive letters both are to act as executors jointly. If the wife is named as executrix, and after she has received her letters she should marry again, her power to act as such ceases from that time.

An executor of an executor cannot act except for the estate of the deceased executor and administrator. Administration *de bonis non* with the will annexed is to be granted upon the other estate. Where unreasonable delay has occurred, in applying for letters testamentary, the court may appoint a special administrator with the will annexed. The order of appointment is to fix and limit his powers. The court can authorize him to bring suit in favor of the estate but not to subject him to suit on claims against it. On the granting of letters testamentary or administration his powers cease. If one of several executors should die or become incompetent, the surviving executor is to complete the execution of the trust, or if all die or become incompetent, an administrator *de bonis non* with the will annexed is to be appointed. The application for and manner of the appointment, person appointed, bond, oath, and letters to be as in other cases.

After letters of administration shall have been given upon the estate of a person as intestate when in fact he made a will, but it was not known until after such administration was granted, on proof and probate of the will, the letters of

administration are to be revoked, and the executor named is to have letters testamentary upon the estate, and the estate is to be settled according to the will, the property and effects in the hands of the administrator, to be given to the executor. All suits in favor of such administrator are to be prosecuted to final judgment by the executor, and where an estate has been finally settled and property distributed amongst creditors, heirs, or legatees, and after property belonging to the estate is discovered, the executor is to take such property and dispose of the same according to the rights of parties to the same, but subject to the order of the court in the matter.

Before letters are given to the executor the bond is to be executed and approved, and then he is to take an oath before the probate judge or clerk that he will perform the duties of executor according to law, which is to be reduced to writing and subscribed by him; on this being done and the letters signed by the clerk and seal prefixed thereto, and delivered to the executor, then and not till then is he clothed with authority to act.(*a*)

INTESTATE'S ESTATE.

All persons dying without will are intestates, and their estates are to be settled by an administrator appointed by the probate court, the estate to be settled according to the directions of the court. The surviving husband or wife or such person as he or she may select, are first entitled to be appointed, next the children of the intestate, next the father or mother, next the brothers, next the sisters, next the grandchildren, next any other of the next of kin, who would be entitled to share in the distribution of the estate, next the public administrator, next the creditors, and any person competent. A person to be competent must be over twenty-one years of age, never have been convicted of an infamous crime, not wanting in capacity, not improvident or addicted to drunkenness. Where there are

(*a*) 2 California Statutes, 452.

several persons equally entitled to the administration, the court is to appoint one or more, and in making a selection males are to be preferred to females.

The marriage of the surviving wife forfeits her right to administration, and if after her appointment as administratrix she marries, it suspends her powers as such, and then an administrator *de bonis non* is to be appointed in her stead. Where a minor is entitled to administration it is to be given his guardian if he have one; where two are equally entitled to the administration, one may select a person to act with the other, and if suitable the court is to appoint him, such selection to be in writing signed and filed in court.

Where several administrators have been appointed and one of them becomes incompetent, or shall die, or is convicted of an infamous offence, or his letters of administration are revoked, the remaining administrator is to complete the administration of the estate. If all however should become incompetent, die, or be convicted of an infamous offence, or their letters be revoked, new letters are to issue to those entitled as stated, to administer on the unadministered part of the estate. The bond, oath, letters, and powers of the administrator *de bonis non* are the same as other administrators.

The letters are evidence of the appointment, also a copy of the order of appointment and the certificate of the clerk that the bond was given, the letters issued, and that they are not revoked, are tantamount to the letters.

Where the probate judge is next of kin to the intestate he cannot act in reference to his estate as judge, either to appoint and administer, receive bond, settle accounts, or anything in reference to it, but may become administrator, and settle the estate. Where the judge of the proper county is excluded on account of interest from acting, the probate court of an adjoining county has jurisdiction of the matter.

The court may appoint a special administrator if no application is made and unreasonable delay has occurred.

In making such appointment the court is to give it to the one entitled, or give the estate in charge of the public administrator if there is one in the county. The order of appoint-

ment is to state the power to be exercised. The bond, oath, and letters of such special administrator are the same as in other cases, and such special administrator may be appointed on the death or revocation of an administrator. Where a fraud has been committed or is about to be committed by the administrator, or where he has wasted, embezzled, or mismanaged the estate, or is about to do so, the court is to suspend the powers of the administrator and if necessary to appoint a special one; and after service of citation and on hearing of the matter the court may revoke the letters and appoint an administrator; the notice of the citation if he has absconded or conceals himself or has removed from the county is to be published as the court shall direct. To compel the attendance of the administrator, the court may issue attachment and require him to answer questions touching his acts as administrator, and on his refusal, the court may commit him to jail until he obey. The suspension and appointment of the special administrator may be upon the knowledge of the judge or upon credible information. The powers of such special administrator or public administrator extends until an administrator is appointed; when that is done he is to surrender to the administrator the property and effects of the estate. The court may empower such special administrator to bring suit upon any or all claims in favor of the estate, but not to subject him to any suits on account of claims against it.

Where an estate has been finally settled and property distributed, and afterwards property belonging to such estate shall be discovered, then the court is to appoint an administrator *de bonis non* for such estate.(*a*)

HOW LETTERS OF ADMINISTRATION ARE GRANTED.

A person wishing letters of administration upon an estate is to present his petition to the probate court, showing that the court has jurisdiction of the case. After filing of the petition, the clerk of the court is to give notice of the time when

(*a*) 2 California Statutes, 452.

the petition will be heard, whose estate letters will be granted upon, and who is the applicant therefor. Three written notices are to be posted up in three public places in the county, one of them to be posted up where the court is held.

Any person may oppose the petition by filing a written statement of the grounds of his opposition whether on the grounds of incompetency or the right to the same in himself. Before the petition is heard the court is to require proof of the death of the intestate, and whether he made a will or not. If the court is satisfied on those points, and that notice was given of the application, the court is to hear the petition. If there be no opposition, and the applicant appears to be entitled to the administration and is competent, letters are to be given him, but if there is opposition, the court is to give the letters to the one who is entitled, if competent, if not competent then to the one next entitled, if competent.

After the decision of the court, the person who is to receive the letters must give bond as required from executors, and take and subscribe an oath to administer the estate according to law. Where two administrators are appointed each must give a separate bond. After giving the bond and taking and subscribing the oath, and the letters are given, they are then authorized to act.(*a*)

BONDS OF ADMINISTRATORS AND EXECUTORS.

The bond of each executor or administrator must be separate and the sureties jointly and severally liable thereon. The sureties must justify before the judge of a court of record under oath, to the effect that they are householders or freeholders, and residents of the state, and worth double the amount for which they become liable over and above their debts and liabilities of property exempt from execution. Such justification is to be in writing signed by the sureties and certified by the judge and filed with the bond. Where

(*a*) 2 California Statutes, 452.

the penal sum of the bond is more than five thousand dollars, the sureties may justify, provided the two sureties have property equal to that amount.(a)

THEIR SURETIES, RESIGNATION, AND REVOCATION OF LETTERS.

If it is ascertained by the probate judge that a bond is defective, or sureties to it insufficient, he is to cite the administrator or executor before him, to show cause why further security should not be given. The citation is to name the time and place, and to be personally served five days before the time fixed for the hearing; but if the administrator or executor cannot be found, then the citation is to be served by leaving a copy at his last place of residence.

Where the sureties have become or are becoming insolvent, or have removed or are about to remove from the state, or from any other cause the bond is insufficient, any person interested in the estate may, by petition, apply for citation to have further security given.

The sureties, or either of them, to a bond, have a right to be released therefrom. To obtain a release, they are to apply by petition to the probate judge, for a citation against their principal to show why the release should not be had.

At the time fixed by the citation, or at any other time to which the hearing of the matter of the citation may have been adjourned, the judge, before he proceeds to hear and determine the matter, is to ascertain if the citation has been served; if so, he is then to proceed, and determine the question. In cases requiring further security, he is to order that it be given within five days, or that their letters be revoked and powers cease. If the case requires new sureties on the application of the old ones, he is to order that it be done in five days, or that their letters be revoked and powers be suspended.

Where he fails to render his accounts upon citation issued by the court for that purpose, the court may revoke his

(a) 2 California Statutes, 452.

letters or attach him; and where he has mismanaged, embezzled, or wasted the property, or is guilty of negligence, and it shall so appear to the court from his accounts, his statements under oath, or in any other way, his letters must be revoked.

If additional security or new bond is given within the time limited, the right and powers of the executor or administrator remain, otherwise they are extinguished from and after such time.

If the executor or administrator shall give new bond on the application of the surety or sureties on the old bond, the sureties are liable for all acts of their principal persons to the time of the approval and acceptance of the new bond, and the judge is to endorse on their bond, that from that time they are not liable for any acts done thereafter.

If, after administration shall have been granted upon an estate, a will of the intestate shall be discovered and proven, and probate allowed, the letters of the administrator are to be revoked and his powers to cease, which the court is to order.

An executor or administrator wishing to resign his appointment, must do so in writing, which will take effect, when an administrator *de bonis non* with or without the will annexed, as the case may be, has been appointed, and letters issued to him, and the person resigning, has fully settled his accounts and delivered over all the estate to him. All acts of an administrator or executor, as such, before revocation of their letters and resignation accepted, are valid as if they had completed the execution of their trust.(*a*)

RIGHTS OF EXECUTORS AND ADMINISTRATORS.

Where the intestate or testator left no widow or heirs, the executor or administrator of an estate is entitled to the possession of the real and personal property of the estate; but where he left a widow and heirs, then they are entitled to the homestead, if in an incorporated town or city;

(*a*) 2 California Statutes, 452.

but if not so situated, then they are entitled to the homestead and twenty acres of land on which it may stand, and the property exempt from execution. If, however, there are neither widow nor children of the intestate or testator, but heirs, then the homestead, but not the personal property exempt from execution, is to be retained by the heirs; and the executor or administrator has the right to collect all debts due the intestate or testator, and if not paid without suit, then to bring suit therefor in his name, as such administrator or executor, without joining them for whose benefit the suit is prosecuted; and he can sue for and recover the possession of real or personal property of the testator or intestate, and receive the rents and profits of the real estate until the estate is settled or ordered to be delivered to the heirs or devisees by the court. It is his duty to keep in good tenantable repair all houses, buildings, and fixtures thereon, that may come under his control; and he can sue for and recover damages against any person who wasted, destroyed, took, carried away, or converted to his own use, the goods of his testator or intestate, in his life time, and sue for and recover for trespass committed on the real estate of his testator or intestate in his life time.

He can sue for and recover on the bond of any former executor or administrator of the same estate. He can, with the approbation of the probate judge, compound a debt due the estate, with a debtor thereof, upon receiving a just dividend of his effects, and can sue the surviving partner of his intestate or testator, for settlement of the accounts of the partnership, as fully as if his testator or intestate were living. If his testator or intestate in his life time conveyed any interest in real estate, or transferred any goods, chattels, rights, or credits fraudulently as against creditors, and such creditors shall apply to have suit brought for such property, and shall indemnify him on account of his proceedings, then he can bring suit and recover such property or damages therefor. He can sell the personal property of the estate, and when necessary to pay the debts or legacies, can sell the real estate; both kinds of property, however are to be sold under the directions of the probate court, except where the testator, by the provisions of his will, directed the sale of certain pieces of real

estate, and then the sale is to be made without the order of the court, but it is to be conducted in the manner of sales of real estate by order of the court, unless otherwise directed by the provisions of the will. He can sell property, real and personal, devised to pay valid claims against the estate, if there be not other property and effects to pay them with; but the property provided by will to pay debts and liabilities of the testator is first to be disposed of before that devised; and where general and specific legacies are given by will, the general legacies are to be sold before specific ones, to pay debts and liabilities of the testator. He may compel the specific performance of all contracts with his testator or intestate for the conveyance of real estate, commencing an action therefor, or completing the action already commenced, if any. He may receive the title in trust for those entitled to property. He can prosecute in an action any person who has concealed, embezzled, or alienated any money, goods, or effects of the deceased after his death, and can recover double the amount thereof, or can compel any person who has concealed or has in his possession, or knows of any deeds, conveyances, lands, contracts, or other writings which contain evidence of, or tend to disclose the right, title, interest, or claims of the deceased to any real or personal estate, or any claim or demand of the deceased, by citation and imprisonment, to answer under oath touching the same, and by imprisonment to deliver the same to him. And where any person has been entrusted with any part of the estate of the deceased, he can compel such person by citation and imprisonment to render an account thereof under oath, and his proceeding in regard thereto, and the delivery of the property or payment of the money to him. The citation is to be issued by the probate court having jurisdiction of the estate, and that granted the letters, but the person may be examined before the probate court of the county in which he may be found.(a)

(a) 2 California Statutes, ch. 3 and 4, p. 452, 460.

DUTIES AND OBLIGATIONS.

At the time of the appointment of the executor or administrator it is his duty to apply to the court for the appointment of persons who are disinterested, to act as appraisers of the estate. Upon receiving his letters and copy of the order, he is to proceed and take possession of all of the personal and real estate that the testator or intestate had at the time of his death, not possessed as of rights by the widow, children, or heirs. Before the appraisers proceed to the execution of their duty, they are to take and subscribe an oath that they will truly, honestly, and impartially appraise the property exhibited to them, to the best of their knowledge and ability; after which the executor or administrator is to present them with the property and assets of the estate, including notes, bonds, accounts, mortgages, and other evidences of claims, and they are to proceed and appraise the same, and in doing it an inventory thereof is to be made, showing the amount and kind of property, and the value in dollars and cents, including the debts on accounts, mortgages, notes, interest in partnership, and all other securities or interests coming to or belonging to the intestate or testator, or owned by him at his death. Any account, claim or demand against the executor or administrator is to be included in the inventory, specifying and describing the interest and sureties as they existed at the time of the intestate's or testator's death, giving the amount, when due, indorsements and when made, the amount that may be collected from each debt, security or interest, and the money belonging to the testator or intestate at his death, which passed into the hands of the executor or administrator after the inventory has been completed. The inventory is to be signed by the executor, and after that is done the administrator or executor is to take and subscribe an oath before the probate judge or clerk thereof, that the inventory contains a true statement of all the estate of the deceased, which has come to his knowledge and possession, and particularly of all money belonging to the deceased, and of all just claims of the deceased against the

executor or administrator. The oath, together with that of the appraisers, is to be endorsed upon, or attached to the inventory which the executor or administrator is to file in the court at the next term after his appointment, [but if it cannot be conveniently done in that time, then the court may, on application for that purpose by the executor or administrator, extend the time, but not more than two months.] If the property to be appraised is situated in another county than the county where letters issue, the probate court of the county where the property is situated may appoint appraisers to appraise it, or the court that issued the letters may appoint them, or require the regular appraisers in the case to make the appraisement. If the property is appraised by different appraisers, it is to be done as stated, [under oath, subscribed by the appraisers, the inventory describing the property and price being prefixed and signed by them.]

Where the property is appraised by different appraisers, the inventories are to be added together, which, when done, forms the inventory of the estate, to which the oath of the executor or administrator is to be annexed.

The executor or administrator, as soon as he shall receive any moneys of the estate, is to pay the funeral expenses, expenses of the last sickness, and allowance made to the family of the deceased; all other payments, except expenses of the administrator, must be made by order of the court. Where the share or portion of one of the heirs or legatees, has by the order of the court, been assigned and set apart, and bond taken from him to pay his proportion of the debts of the estate, when the time comes that payment thereof should be made, application is to be made to the court by petition for citation against such party to show cause why he should not make the payments, and after the citation is personally served and the time arrived to show cause, the court, after hearing the parties, if it shall think the payment should be made, will so order it, fixing the amount and time when payable; and if not paid within the time, suit is to be brought on the bond by the executor or administrator.(*a*)

(*a*) 2 California Statutes, ch. 124, p. 448 to 489.

CLAIMS AGAINST THE ESTATE.

The executor or administrator, immediately after and at the time of his appointment, is to obtain the order of the court fixing the time that notice to the creditors of the estate, to present their claims for settlement, is to be published. The court may fix any time not less than once a week for four weeks, nor more than ten months; to be published in a newspaper in the county, if one, but if none, then the court is to designate the papers. The notice is to require all persons having claims against the deceased to present them, with the necessary vouchers, within ten months thereafter, to the executor or administrator at his residence or place of business, describing it. After the publication of the notice, he is to file with the court a copy thereof, together with the affidavit of the printer or publisher that the same was published as required by the order.(*a*)

He is to require all claims presented for his allowance to be verified by the oath of the claimant, that the amount thereof is justly due, that no payments have been made upon it, and that there are no set-offs to the same, to his knowledge; and he may, in addition, require of the claimant satisfactory vouchers.

All claims presented he is to allow as valid or to reject them; if allowed, the same are to be presented, and approved or rejected by the probate court, which is to endorse the same, giving the date of approval or rejection.

Any claim barred by the statute of limitation is not to be allowed by the administrator or executor, but the time from the death of the deceased until the appointment is perfected is not to be counted against a claim, and if not presented within the ten months from date of notice or from maturity, the same is barred and is not to be received and allowed as a claim against the estate. Suit cannot be maintained and recovery had against the executor or administrator unless the same is presented to the executor or administrator for allowance, and payment in due course of adminis-

(*a*) 2 California Statutes, 464.

tration; but if suit is brought and judgment recovered, no lien is created thereby, nor can an execution issue thereon, nor will it give the creditor any priority of payment. The record thereof is to be presented to the executor or administrator for payment or dividend, in due administration of the estate, and is by him to be treated as any other valid claim against the estate.

Where the executor or the probate judge is willing to allow part of the claim presented, and it is not accepted by the creditor, and suit is afterwards brought upon it, if the recovery is not greater than the amount the executor is willing to allow, the creditor is not entitled to any costs.

Where actions are pending against the deceased, the claims on which the same is founded are to be presented as any other claim for allowance or rejection, and if not so presented and endorsed, no recovery can be had thereon. Where judgment has been recovered against the deceased before his death, and no execution has issued thereon before his death, none can issue and be executed without the order of the probate court; and if not so ordered, the judgment must be presented for payment as any other claim. The lien acquired by the judgment creditor, if presented, is valid, and must be respected by the executor or administrator in the settlement of the estate; but when the probate court allows an execution to issue on the judgment, and property to be sold to pay it, the surplus, if any, must be paid to the executor or administrator.(*a*)

He may refer any claim to the decision of a referee; if he doubts its correctness, the reference to be reduced to writing, and the referee to be approved of by the probate judge. The contract of reference and approval of the judge is to be filed in the office of the clerk of the district court of the county where his letters were granted him. The clerk, whether in vacation or term time, is to enter a rule referring the matter in controversy, after which the district court has jurisdiction of the case, and the case is to proceed in all respects as if referred while pending in the district court.

If any costs are recovered against the executor or admin-

(*a*) 2 California Statutes, 85.

istrator, the same is a claim against the estate, unless the suit was resisted or prosecuted without just cause. The claim of the executor or administrator against the estate is to be presented for allowance to the probate judge, duly authenticated with affidavits, and if allowed by him, is a valid claim against the estate. At the time when he is required to return the inventory, he is to return to the court a statement of all claims presented, the amount, nature, and time of maturity, and whether allowed or rejected; and from time to time is to present to the court such statement of all claims subsequently presented him.

At the term or time when the inventory is returnable, he is to apply for order to sell the perishable property belonging to the estate, and so much other property as is necessary to pay off and discharge the allowance made to the family of the deceased, and the valid claims against the estate. The personal property, as the proceeds are required, is first to be sold; but if not enough, then so much as is necessary of the real estate is next to be sold.(*a*)

PERSONAL AND REAL PROPERTY, HOW SOLD.

He is to petition the court for the sale of the perishable personal property, setting forth facts sufficient to show that the sale is proper.(*b*) And in like manner a petition for the sale of other personal property, showing, by the statements of facts, that so much is necessary to pay off the valid claims against the estate. When it is necessary to sell real estate, the petition must show the amount of personal estate sold, the application of the proceeds, the amount of such property remaining unsold, if any, the value thereof, the amount of valid claims outstanding against the estate, a full description of the real property of the estate, the condition and value of each portion or lot; the names and ages of the devisees, if any; if none, then the names and ages of the heirs; the part or portion necessary to sell. The petition for the sale of real estate is to be verified by his oath.

(*a*) 2 California Statutes, 464. (*b*) 2 California Statutes, 467.

ORDER AND NOTICE OF SALES OF PERSONAL AND REAL PROPERTY.

Any person interested in the estate may file written objections to the sale, which the court is to hear and determine. If the order of the court is made that the executor or administrator is to sell any or all of the personal property, (but articles of personal property not necessary for the support of the family of deceased, and not bequeathed, are to be first sold, and if specially bequeathed, they are not to be sold until the rest have been disposed of, and it becomes necessary to sell them,) the sale of the personal property is to be advertized by posting up three notices in public places in the county, ten days previous to the day of sale, stating the time and place thereof. The court may also require the notice of sale to be published in some newspaper of the county. Where the personal property ordered to be sold is not sufficient, and more remains undisposed of, he is to apply for further order to sell some or all of that which remains unsold. Upon an order granting further sale, in the same manner as before. Upon the filing of his petition for the sale of real estate, if the court is of opinion the sale is necessary, the judge is to make and have an order entered, directing all persons interested to appear before him, naming the time and place, to show cause against the order of sale, not less than four, nor more than ten weeks from the entry of such order. Notice of the order is to be given by personal service of the copy of the order ten days before the time appointed for the hearing, or to be published four successive weeks next before the hearing, in some newspaper to be designated by the court. If all persons interested shall sign a written consent, and the same is filed in court, the notice may be dispensed with, except as to the general guardian of minors; they are to be personally served with a copy of the order.

The court, at the time and place appointed in the order for the hearing, or at such time as the same may be adjourned to, before proceeding to hear the matter of the petition

is to require proof of the service or publication of the order; or the written consent of the parties interested may be filed instead thereof. If the consent of those interested is not filed, but proof of the service of the order is made, then the court is to ascertain if any persons interested in the land sought to be sold are minors, and have no general guardian; if so, the court is to appoint guardians for them, to appear and take care of their interests in the proceedings. He may be examined on oath touching the matter, and witnesses may be compelled to appear and testify at the instance of either party. If it shall appear to the court necessary to order the sale, it is to be done. When it is necessary to sell part of the real estate, and by doing so the rest will be reduced in value and prejudiced, then the court is to order the sale of the whole. In ordering a sale of real estate, care is to be taken to prevent injury to the estate. In selling it in pieces or parts not saleable, or selling portions to the prejudice of other parts of it, full power and authority is given the court to divide and subdivide the estate, and order it to be sold according to such subdivision as will be most advantageous for the estate, and those interested in it. The estate may be sold on a credit of six months.

Where any part of real estate has been devised, and not charged in the devise with the payment of debts, the court is to order the part descended to heirs to be sold; and if the proceeds are not enough, then to sell that devised, or as much of it as is necessary.

In selling real estate, after procuring the order therefor, he is to advertise the sale for three weeks, by posting up written notices in three public places of the county, next preceding the sale, and by publishing a copy of the notice in a newspaper printed in the county, for the same time next preceding the sale; if no paper is published in the county, then in such paper as the court may order. The notice is to describe the land with common certainty, and name the time and place of sale.(*a*)

(*a*) 2 California Statutes, 467, 468, 469, 470, 471, 472.

PLACE AND MANNER OF SALE.

The sale of personal property is to be at the court house door, or residence of the deceased, or at some public place in the county; and it is to be sold by public auction to the highest bidder, and at reasonable time. Real estate is to be sold at public auction in the county where the lands are situated, at a convenient and public place, between the hour of 9 o'clock, A.M., and the going down of the sun. The sale may be adjourned from day to day, by public proclamation before the people at each adjournment. If the adjournment is for more than one day, notice is to be given either by posting or publishing the same, or both, as the circumstances may admit.(*a*)

THE PURCHASER.

Any person, except the executor or administrator, may be the purchaser at such sale by bidding therefor the highest bid. A sale by the executor or administrator, in which he is interested directly or indirectly in the purchase or proceeds thereof, is void; and if discovered before confirmation, it will not be confirmed, but set aside; he is not permitted to be interested in the purchase of anything he sells.(*b*)

REPORT OF SALE.

At any time before confirmation of a sale, any person interested in the estate may file in the court written objections to the confirmation of it. The objections are to be heard by the court on the coming in of the report by the executor or administrator. Witnesses on both sides may be examined touching the matter. At the next term of the court after a sale made of real estate, the executor or administrator is to report his proceedings of the sale to the court, stating the property sold, the purchaser, and price for which it was sold. The court is, at such term, to examine the pro-

(*a*) 2 Cal. Stat., 469. (*b*) 2 Cal. Stat., p. 472, s. 193.

ceedings of the executor or administrator in making the same. If fair and regular, the sale is to be confirmed; if unfair, and the the amount of the sale, and ten per cent. can be obtained for it, exclusive of the expenses for new sale, the court is to set aside the sale, and order the property to be sold again, as if no sale of it had been made, which sale is to be advertised, made and reported as pointed out.

Before the order of confirmation is entered, the order confirming the sale is to direct conveyances to be executed; and, upon receiving the purchase money, the executor or administrator is to execute and deliver the deed to the purchaser, which is to recite the order authorizing the sale and the order confirming the same, with a description of the property sold, using the usual terms of conveyance, which will operate a conveyance.(*a*)

EQUITIES IN REAL ESTATE.

If it is necessary to sell the intestate's equities in real property, it is to be done by petition stating the same, the character and nature of the contract of purchase, the amount due thereon, and to whom. The order of sale is to direct the property to be sold subject to the payments. Before the sale is confirmed, and assignment ordered to the purchaser, he is to give the executor or administrator a bond, with sufficient sureties approved of by the court, to indemnify him against the claim for payments and costs and expenses that may accrue in favor of the vendor of the deceased, for the land sold. Upon the bond being executed and delivered, and the order of confirmation and assignment entered, the executor or administrator is to execute to the purchaser an assignment of the contract for the land, which conveys the rights and remedies of the deceased against the vendor, as well as the equity of the land.(*b*)

Where it is necessary to sell real property, subject to a mortgage executed by the deceased, the proceeds are to be applied, first, to expenses of sale, next, to the liquidation of

(*a*) 2 Cal. Stat., p. 469, s. 169. 2 Cal. Stat., 471.

the mortgage debt, and the residue, if any, in the due course of administration.

The expenses of sales of real property are to be first paid out of the proceeds.

The executor or administrator is to transfer all property sold by deceased in his life time upon the order or decree of a competent court, the personal by a transfer of it, the real by a conveyance. A sale and conveyance made by the executor or administrator in pursuance of the order of the court, cannot be questioned, unless it is done within three years from the sale; except minors and those laboring under disabilities, and then within three years after the removal of the disability.(*a*)

ACCOUNTS.

The executor or administrator is to debit himself with the amount of money received from the estate, money on hand, money for goods and property sold, and from debts collected, and rents and profits received from real and personal property.(*b*) He is to be credited with the amounts paid out for charges and expenses against the estate. The account (of debts and credits, together with the amount of unsatisfied valid claims against the estate, the amount in litigation, if any, the amount of claims in favor of the estate collectable and not disputed, the amount disputed and in litigation, the amount of personal and real property not sold) he is to present to the probate court at the third term thereof after his appointment, and as oftener thereafter as the court, upon its own motion, or that of any person interested in the estate, may require.

If he fails to render an account at the third term of the court after his appointment, the court is to issue citation to compel him. So, too, when any person interested in the estate shall present to the court his petition showing that it is necessary to render such account, the court, if of opinion the account should be rendered, is to issue citation to compel

(*a*) 2 California Statutes, 472. (*b*) 2 California Statutes, 472.

the account rendered; and on service of the citation, the account is to be exhibited; any item or statement of which, any person may, by written objections filed, contest.

The executor or administrator is to render a full and complete account at the end of one year from his appointment, filing therewith his vouchers for all parts. The account for settlement is to be rendered as soon as the condition of the estate will admit. But a general account with the vouchers must be presented at the end of the year. If the estate is in a condition to be settled before the year expires, the account is to be filed, notice given, and the estate settled, and if not then, as soon after the year as the condition of the estate will admit of.

On the filing for settlement of the general account, and vouchers for the payments made, notice thereof is to be given by the clerk by posting up, in three public places in the county, written notices stating the estate to be settled, the name of the executor or administrator, and the day appointed for the settlement of the account. The day for the settlement must be fixed on some day of a regular term of the court. On the day fixed for settlement, or on any day thereafter to which it may be adjourned, any person interested in the estate may file his written objections to, and contest the account. If there is a minor interested in the estate, who has no legally appointed guardian, the court may appoint a person to act in the matter for such minor, who may contest the account; and the court is to allow such person reasonable compensation for his services. The court may appoint one or more auditors to examine the accounts and make report thereon, subject to confirmation by the court; and the court may allow a reasonable compensation for their services, payable by the estate. Before the court commences the settlement of the account, the executor or administrator is to prove that notice of the time and place of settlement was given. The court may, on the oath of the executor or administrator, allow a charge for an item of expenditure of not more than twenty dollars, for which he has no vouchers, but such items in the aggregate are not to exceed five hundred dollars. The oath must be positive and uncontradicted, and

state where and to whom paid. In case no provision is made by the will, or the executor does not renounce all claims to compensation, he is to be allowed for the first thousand dollars seven per cent., for all over that sum and less than two thousand dollars, five per cent., all sums above that, four per cent., and the same to the administrator. Further allowance may be made by the probate judge, but not greater than the amount named, and that when done is for extra services.(a)

DISBURSEMENTS.

The moneys of the estate are to be disbursed—first, the funeral expenses; second, the expenses of the last sickness; third, allowance to the family of the deceased, if any made; fourth, the debts having preference by the laws of the United States; fifth, judgments against the deceased in his lifetime, and mortgages in the order of their dates; sixth, all other demands against the estate. Where a mortgage was given by the deceased on a special piece of property, the proceeds of the sales of such property, less the expenses of sale, are to be applied to the payment of the mortgage debt; and the residue of the debt, if any, is to be included in the sixth class of claims against the estate. If the estate is insolvent, the disbursements are to be made in the order stated, as far as the moneys of the estate will extend; if there is enough to pay in full, the first, second, third, fourth, and fifth, but not enough to pay all the debts, then these are to be paid in full, and the residue to be divided amongst the sixth. If there be enough to pay in full the first, second, third, and fourth, but not enough to pay the fifth in full, then the first four are to be paid in full, and the residue is to be applied to the fifth as far as it will reach; and on the settlement of the accounts rendered at the end of the year, the court is to order the debts paid. If there are not funds enough, then such are to be paid as the court shall order. If there are enough to pay all, and they are contingent and disputed claims, then such amount thereof as the holder would be

(a) 2 California Statutes, 476.

entitled to is to be paid into court, to be paid to the holder of the claim, if established; or paid out and distributed, as the circumstances of the case require. Claims not due are to be paid on rebate of interest, if accepted by the holder; if not, then the same is to be paid into court until the maturity thereof. The settlement that may be ordered by the court is binding upon the rights of all parties interested, except those under legal disability, and is, as to those, presumptive evidence of its correctness. The decree of the settlement is to recite the proof of notice having been made, and upon the executor or administrator paying the debts as ordered, the balance, if any, is to be distributed amongst the widow, heirs, or legatees, according to their rights thereto, as the court shall order.

PETITION, AND DISTRIBUTION OF THE ESTATE.

The heirs or legatees of an estate, jointly or severally, at any time after the third term, may apply by petition to the probate court for his share of the estate, upon his giving bond with good sureties to pay his part of the debts and liabilities of the estate. The clerk of the court is to post up a notice in three public places of the county. The notice is to state the name of the heir or legatee, the estate, and that the applicant applies for his share of the estate on giving bond, and the time and place when and where the application will be heard. The executor or administrator, or any other person interested in the estate, may resist the application. If it appears to the court at the hearing of the application, that the estate is but little indebted in proportion to the assets, and that the share or shares applied for, or a part thereof, may be set apart and given to the applicants without injury to the creditors, the court is to order the same done upon their giving bond in a sum to be named by the court, with sureties to the satisfaction of the court, payable to the executor or administrator, conditioned that the applicant will pay his proportion of the debts of the estate, when

(a) 2 California Statutes, p. 479, sec. 239 to 249.

required to do so by the order of the court. If it shall be necessary to make partition between the applicant and another or others, the court is to cause it to be done; partition of an estate being made after payment in full of the debts thereof.

Where the debts of an estate are fully paid, and the estate that is left belongs to more than one person, and to enable each to enjoy his share thereof in severalty, it is necessary to make partition of the same amongst them, and they or either of them require it to be done, the probate court is to do it, on the application of the executor or administrator, or any other person interested in the estate; but, whoever makes application, must give notice of the time and place when and where the application will be heard, by posting up written notices in three public places in the county for three weeks next before the hearing; and, in addition thereto, by publishing a copy thereof in a newspaper published in the county, if one; but if not, then in such paper as the court may order, for the same time; and in addition thereto, the court may order such notice to be served, by personal service or by publication, on the widow, and heirs or legatees, whether residing in the state, or out of it, or upon their agents, guardians and attorneys, in the state. The court, upon the hearing of the application, is to appoint guardians for all minors or insane persons interested in the estate to be divided, and appoint an agent to act for those who reside out of the state, and to require proof of the necessary notice; and the court is then to proceed and settle all questions about advancements made, or alleged to have been made by the decedant to any heirs, if any such questions are presented to the court, and to decide upon the matter after the parties and proof have been heard, fixing the amount to be charged against each heir's share, if any charge is to be made.

The court is to appoint three disinterested persons to make partition of the estate, and that, too, where the real estate may be in different counties; but, where that is the case, instead of the regular commissioners appointed doing it, the court may appoint persons in each county to partition off the real property in their respective counties, between the

persons entitled thereto. The assignee or grantee of an heir or legatee is to receive the share of his assignor or grantor, and may represent him in the proceeding. The commissioners appointed are to be sworn to discharge their duties faithfully, after which they are to give notice to the parties interested in the estate, their guardians or agents, of the time and place of the partition, and then to proceed and make the partition. If there is any tract or tenement of land of greater value than either party's share in the estate, the commissioners may set off the same to a party entitled to a share, if a male, and he will accept it; if not, then to a female, if she will accept it, and pay the difference between his or her share, and such tract or tenement. Where the whole or any part of the real and personal property cannot be fairly divided, the commissioners are to recommend the same to be sold, and report the same to the court. Where the estate required to be divided is in common with the estate of another, the commissioners are to sever it from that other, and then partition it, as directed by the order of the court.

The commissioners are to report their proceedings to the court. If, upon the coming in of the report, a fair partition of the estate has been made, and notice has been given to the parties interested, their guardians and agents, as required, the court is to confirm the same. In making the partition, if any party is to pay, or secure to be paid, any sum of money fixed and determined between such party and the commissioners, the court is to have such payment made, or security given, and then to confirm the report of the commissioners. If the commissioners could not make the partition of any or all of the real or personal property, and their report be confirmed, and no person interested in such estate shall apply for it at an appraised value, to be made by commissioners to be appointed for that purpose, the court is to order the same sold by the executor or administrator, or an agent appointed for the purpose. The sale is to be conducted as sales of personal and real property, to pay debts, and the proceeds thereof are to be brought into court, and divided amongst the parties, according to their rights thereto; but, in case several parties in interest apply to take the property

at appraisement, which all may do as of right, the court, in granting the property, is to prefer males over females, and the elder over the younger. After the court has designated the person or persons to whom the property will be granted, three disinterested persons are to be appointed by the court to make such appraisement, who are to do it under oath, and report the same to the court. The person or persons to whom the same has been granted must pay to the other parties in interest their proportion, or secure the same to their satisfaction. Upon that being done, the court is to perfect the grant, and confirm the property to them. In case the commissioners shall make the partition, and the confirmation of it is resisted; or without being resisted, the court may, for sufficient cause, set the same aside and commit it to them again, or appoint other commissioners to make the partition. Where the commissioners recommend that the estate, or any part of it be sold, the court may set such report aside, and commit the matter again to them, or appoint other commissioners to make the partition.

The decree of the probate and appellate court, as to the advancements made to heirs, and the interest of each party in the estate, is valid, and binding upon all parties in interest; so, too, the decree confirming the grant to one or more of the parties in interest, of part or all of the estate, at the appraisement.

If the partition includes real estate, then the report of the commissioners, and decree confirming the same, is to be recorded in the records of the probate court, and a copy thereof, certified by the clerk under the seal of the court, is to be recorded in the county or counties where the lands lie. When the grant of property at appraisement includes real estate, the decree of the court making the grant and appointing appraisers to appraise the same, the report of the commissioners, and the decree confirming the same, are in like manner to be recorded in the records of the probate court, and copy thereof certified by the clerk, to be recorded in the counties where the lands lie.(*a*)

(*a*) 2 California Statutes, p. 480, chap. 11.

NON-RESIDENTS' SHARES OF PARTITION.

Where personal or real property is assigned to a non-resident of the state, who has no agent residing here, the court is to appoint an agent, who will take possession and manage the property for such non-resident. The court, before the appointment is perfected, is to require of the agent to give a bond to the judge, payable to the principal, and by the judge approved, conditioned that he will faithfully manage and account for the estate; said agent to be allowed a reasonable sum out of the profits of the estate for his services and expenses. In the event such estate remains in the hands of the agent for one year unclaimed by the owner, the same is to be sold by order, and under the direction of the probate court; and the proceeds, after deducting reasonable expenses of sale, to be fixed and determined by the court, are to be deposited in the state treasury. When the agent makes such payment, he is to take the duplicate receipts from the treasuary, one of which he is to file with the comptroller of the state, the other with the probate court.(*a*)

AGENT'S LIABILITY.

The agent's liability extends to the preservation of the estate while in his hands, and the payment of the proceeds thereof to the principal, or to the treasury of state; and any person interested in the matter may sue him upon the bond.

The non-resident owner may claim the money and obtain it from the treasury of the state, by applying for the same to the probate court. The court, after being satisfied of his right, is to certify the same; and, on presenting the certificate to the comptroller, he will draw on the treasury for the amount deposited by the agent.(*b*)

(*a*) 2 Cal. Stat., p. 484, s. 274 to 278. (*b*) 2 Cal. Stat., p. 484, s. 277.

LIABILITIES OF THE EXECUTOR OR ADMINISTRATOR.

The executor or administrator, if he fail to render his account at the third term of the court after his appointment, is liable to citation; and, after service of the citation to render an account of the situation of the estate, or show cause why he should not be attached, he must render the account required, or the attachment will be issued.

If he fail to render his account, and settle the same as soon after the third term as the affairs of the estate permits, or fails to render his account, and exhibit his vouchers within the year, he may be attached; and, within thirty days after the attachment is executed, and the accounts not filed or settled, as the case may be, the court is to revoke his letters. If he commits waste, mismanages or is guilty of negligence, the court is to revoke his letters. Where the executor or administrator lives out of the county, absconds, or conceals himself, so that citation cannot be served on him, then thirty days after the expiration of the year, is allowed him to render his account, and, upon failure so to do, his letters are to be revoked. On settlement of his account, and order entered for payment of a part or the whole of the creditors, the order operates as judgment in favor of those to whom payment is ordered to be made, against the executor or administrator, and if not paid, he is liable to have an execution issued against him individually for the amount of their claims, or the dividend thereon. His bond is also liable to them, and they may, on failure to collect, bring suit on the same, and coerce the payment from the sureties. So, too, as to the amount due the widow, heirs, or legatees, and ordered to be paid on settlement, the order is a judgment in favor of each, upon which an execution may issue in their favor respectively. If the executor or administrator fails to give the notice required, all creditors not included in the order of payment, and whose claims were due ten months before the settlement, are barred as against the creditors ordered to be paid, the heirs, legatees, or executor or administrator; but, if the notice was not given, the executor or

administrator is liable to pay the same, and a recovery may be had against him on his bond.

When an executor or administrator shall be guilty of neglect or misconduct in conducting a sale, by which those who are interested in the proceeds are injured, he is liable to the party aggrieved, and a recovery may be had on his bond; and where he makes a fraudulent sale, he is liable on his bond for double the value of the land sold. Where the executor or administrator has fully administered upon the estate by paying out all the money thereof and delivering over all property, as ordered and decreed by the court, and vouchers to that effect are presented to the court, the court is to pass and enter a decree discharging him from all liability.

PUBLIC ADMINISTRATOR.

The law provides for the election of a public administrator for each organized county, whose office continues until his successor is qualified. After his election, he is to give bonds to the acceptance of the probate judge in a sum not less than thirty thousand dollars, which may at any time be increased at the instance and according to the discretion of the probate judge. His duties and rights, in regard to any estate in his hands and subject to his control, are the same as other administrators. The public administrator is every six months to make return under oath of all estates that have come to his hands, the value thereof, the expenses, if any, paid thereon, the balance, if any, remaining in his hands, and to publish the same in some newspaper in the county six times.* If no newspaper is published in the county, then

* Public administrators in their respective counties are hereby required to settle and adjust their accounts relating to the collection, care and disbursement of money or property belonging to the estates of deceased persons, with the county clerk, on the first Monday of each month. Laws of 1853, p. 211, sec. 2.

Such county treasurers and public administrators, for the purpose of making such settlement, shall make out a statement under oath of the amount of money or other property received preceding such settlement, and up to the period of such settlement, the sources from whence the same was derived, the

notice is to be posted up a reasonable time in the office of the county clerk, legibly written or printed, and in addition to this return he is to render a yearly account to the county auditor, stating the estates that have come into his hands, and disposition made of them, the amount of money received in each and disposition thereof, the number in his hands undisposed of, the money and property of each, and his fees in each estate, as well those settled and disposed of as those on his hands. The account is to be published in two journals of the state, one of them to be in his own county, if one is published there. It is the duty of all persons knowing of the death of strangers or persons without known heirs, to give immediate notice to the public administrator of the county; and in default they are liable to the public administrator or any person interested, for any damages that may be sustained thereby. All persons, including the civil officers of the county, are to inform the public administrator of any property belonging to an estate which he is entitled to administer upon.

The public administrator is not to be directly or indirectly interested in any expenditures of any estate in his hands, nor is he to be connected in business or otherwise with any person who shall be so interested; and in his report to the probate judge every six months, he is so to state under oath. He is liable for any wilful misdemeanor in office, and may be indicted and fined in any sum not exceeding two thousand dollars, and removed from office. If any vacancy occurs in the office of public administrator, the district judge in whose district the county is situated, is to appoint some suitable person to fill the same.

amount of payment or disbursements, and to whom, with the amount remaining on hand; such statement shall be verified by the oath of such party to be a true and correct statement of the same. Ib. sec. 3.

Any officer as aforesaid, failing or refusing to make such statement and settlement as aforesaid, shall, for the first offence, upon conviction thereof by a competent court, be deemed guilty of a misdemeanor, and punishable by a fine not less than fifty dollars nor more than five hundred dollars, and for the second offence, on conviction thereof, be liable, in addition to such fine, to be removed from office by the judgment of the court of sessions of such county. Ib. sec. 4.

The probate judge and court have the same control over him and the estates in his hands, as in other cases. Four per cent. upon the amount of the estate administered are all the fees to be charged and recovered by them; no additional allowance to them can be made by the court for extra services.(*a*)

APPEALS.

In cases where the appellant is an executor, administrator, trustee, or a person acting for and on behalf of another right, the court from which the appeal is taken can, in its discretion, dispense with or limit the security of the appellant.

The securities to an undertaking are to verify by affidavit that they are each worth double the amount named therein, over and above all their just debts and liabilities, exclusive of property exempt from execution. The respondent, in case he is not satisfied with the sufficiency of the sureties, may, within five days after the undertaking is filed, except to the same, and file his exceptions in writing, and give notice thereof to the appellant, and then the appellant is to give notice to the respondent in writing, that the sureties or others will appear before the court below or the county judge or clerk, within five days from the day of filing the exceptions.. The appellant is then to take his sureties at the time and place and to the court, judge or clerk named in his notice for justification, and there the sureties or others are to justify to the acceptance of such court, judge or clerk, who is to certify the same on the undertaking; then on the filing the undertaking verified, accepted and certified, the stay of the execution of the judgment or order appealed from is effected; when the judgment or order appealed from directs the sale of perishable property, the court below may order the property sold and the proceeds brought into court and placed on deposite, to abide the event of the suit before the appellate court, after the appeal has been perfected and undertaking given to stay execution.

(*a*) 2 California Statutes, 206, 318, 488, 525.

From trial judgments of these courts in actions commenced in them or finally entered by them in special proceedings commenced in them, appeals can be taken at any time within one year.

From final judgments rendered by these courts on appeal from an inferior court, appeals to be taken within ninety days after rendition of the judgment.

From order made by these courts at a special term, appeals to be taken within sixty days after the order is made and entered into the minutes of the clerk.(*a*)

(*a*) 2 California Statutes, 106, 107, 108.

CHAPTER IV.

PRACTICE IN CIVIL CASES IN JUSTICES' COURTS.

THE PLAINTIFF.

THE action must be prosecuted by the real party in interest, except in cases of an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute to sue: the father or mother of a child that has been injured or killed; the guardian of his ward who has been injured or killed, and those who are united in interest in the matter of the suit, should be joined as plaintiffs; but, in case there are some who refuse, the rest can sue, and those who refuse to become party plaintiffs along with them, may be made party defendants with those who are the proper defendants, by charging the fact in the complaint. Where there is a question of common or general interest to many persons, or the parties are numerous, and it is impracticable to bring them all into court, the action can be brought by one for the benefit of all. In case of the death or other disability of the plaintiff, after the action has been commenced, the court is to allow the representative or successor in interest to prosecute the action. In case of the transfer of the plaintiff's interest in the subject matter of the action, after the same has been commenced, the court, on motion, may continue the action in the name of the original party, or allow the assignee to be substituted in his place.(*a*)

DEFENDANT.

Any person who claims an interest in the subject matter

(*a*) 2 California Statutes, 134.

of the controversy, adverse to the plaintiff, may be made a party by the plaintiff; but, till persons who have an interest in the controversy, adverse to the plaintiff, and who are necessarily parties to a complete determination or settlement of the question involved in the action, must be made parties, except where the question is one of a common or general interest to many persons, and the parties defendants are numerous, and it is impracticable to bring them all before court, one or more may defend for the benefit of all; and in cases where persons are severally liable upon the same obligation or instrument, the plaintiff may sue one or all, as he shall determine; and in case of the transfer of the interest in the subject matter of the action by one or all of the defendants, after the action is commenced, the action is to be continued in the name of the original party, or the court will substitute the assignee, and in case of the death or other disability of the defendant or defendants, the court, on motion, is to allow the representative or successor in the interest to defend in place of the original party.(a)

AS TO MAKING NEW PARTIES.

The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but, in case a full and complete judgment of the court cannot be pronounced in the action without the presence of the parties, it is the duty of the court to order them to be brought in.(b)

OF THE COMMENCEMENT OF ACTIONS.

In actions to foreclose a mortgage or other lien on personal property, for forcible or unlawful entry upon, or forcible or unlawful detention of lands, tenements, or other possessions, or to recover possession of mining claims, the complaint is to be in writing, stating the cause of action, and verified by the oath of the plaintiff. In other actions, the complaint

(a) 2 California Statutes, 134. (b) 2 California Statutes, 35, 134.

may, at the option of the plaintiff, be oral or in writing; when oral, the justice is to take down in his docket the substance of the complaint; but if in writing, the justice is to file it, and note the filing in his docket. The complaint is to state, in a plain and direct manner, the facts constituting the cause of action, so that a person of common understanding will know what is intended. After the complaint has been made or filed, the justice is to issue a summons against the defendant.

The summons is to require the defendant to appear before the justice at his office, naming the township or city, at a time specified therein, to answer the complaint of the plaintiff for the cause of action, describing the cause of action in such manner as to apprise the defendant of the nature of the claim against him; and in case the action is for money or damages, the amount thereof is to be stated in the summons for which judgment will be taken, in case the defendant shall not appear and answer.

Before the summons is issued, the justice may require an undertaking as security for costs, as he shall determine.(*a*)

SERVICE OF SUMMONS.

If the plaintiff or defendant resides out of the city or township, the summons is to be returned within two days from its date, and served one day before the time limited for the appearance of the defendant.

In all other cases, it is to be returnable in not less than two, nor more than ten days from its date, and is to be served at least two days before the time for the defendant's appearance.(*b*)

Service is to be by the sheriff, or a constable of the county.

HOW SERVED.

The service is to be by delivery of a copy of the summons to the defendant, except where the defendant is a corpora-

(*a*) 2 California Statutes, 135. (*b*) 2 California Statutes, 135, ch. 2.

tion, then to the president or other head of the corporation, or to the secretary, cashier, or managing agent thereof, or, when no such officer or corporation resides in the county, to a director, resident in the same. And in a case against a minor under the age of fourteen years, then by a delivery of a copy of the summons to such minor, and copy to his father, mother, or guardian; or, if there be no father, mother, or guardian in the county, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is.

And in a case against a person judicially declared of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed by delivery of a copy of the summons to such guardian.(*a*)

After the service of the summons, and time limited for the defendant's appearance, the justice has jurisdiction in the case.

The plaintiff, or his agent or attorney, must appear at the return day of the summons, and within one hour after the time fixed in the summons. If he fails to do so, the justice is to dismiss the case. If, however, the defendant fails to appear, and the plaintiff is ready before the court for trial, and the action is brought on an account, note, bill, or other obligation, and a copy of same was left with the justice at the time of issuing the summons, judgment is to be given in favor of the plaintiff and against the defendant for such sum as the justice shall deem just, but not for a larger sum than is specified in the summons, together with costs of suit.

In case the plaintiff is present and the defendant is not, and the suit is of that character requiring the plaintiff to prove his cause of action, and the plaintiff is not ready with his witnesses or other proof, then the court, on motion of the plaintiff, may continue the action, as in other cases.

The defendant can make his appearance by filing his answer to the complaint of the plaintiff, or by giving notice to plaintiff, in writing, of his appearance; and, when an agent or attorney gives notice for him, after appearance, the de-

(*a*) 2 California Statutes, 135, ch. 2.

fendant or his attorney is entitled to be served with notice of all subsequent proceedings of which notice is required to be given.

The service may be personal, by delivery of the notice or paper.

If upon the attorney, by delivery to him personally, or, if he is not at his office, to his clerk or other person having charge of his office. If no person is in his office, then, between the hours of eight in the morning and six in the evening, by leaving the same in a conspicuous place in the office. But if the office is not open so as to make the service, then by leaving the same with some person of suitable age and discretion at the attorney's residence, if he has one, if not, then by enclosing the document in an envelope, directed to the attorney, and placing it in the post-office.

If the defendant appears, he can make his answer to the complaint.(a)

THE ANSWER.

Where the action is to foreclose a mortgage on personal property, or for forcible or unlawful detention of lands, tenements, or other possessions, or to recover possession of a mining claim, the answer is to be in writing and verified by the oath of the defendant.

If the action is founded on an account, promissory note, bill of exchange, or other obligation, for the payment of money, or for a special amount of property, at a valuation fixed therein, and upon issuing the summons, the plaintiff left a copy with the justice, the answer of the defendant is to be so formed as specifically to deny the same, and it is to be verified by the oath of the defendant. Unless the answer is so formed and verified, the cause of action is to be taken as admitted by the defendant.

The answer of the defendant is to contain a denial of any or all the material facts stated in the complaint; and any material fact not so denied is to be taken as admitted by the

(a) 2 California Statutes, 135, ch. 2.

defendant. But in reference to any particular allegation of the complaint, if the answer shall state that the defendant has not sufficient information to form a belief in reference to it, the court is to take it as a denial of that allegation.

The defendant may, in his answer, set forth facts other than the facts detailed in the complaint as a defence, or as a counter claim to the demand of the plaintiff. The defence or counter claim is to be such as the defendant could recover, before a justice's court, against the plaintiff, in case he should bring suit upon it.

And when the defendant has a claim against the plaintiff, founded on an account or instrument for the payment of money, and there is due on the same a specified amount from the plaintiff, he may, in place of the answer, deliver to the court a copy of the account or instrument, stating to the court the amount he claims to recover, or set off against the plaintiff's demand, and at the time this is done by the defendant, the court may direct the original account or instrument to be shown or exhibited to the inspection of the plaintiff, and a copy thereof to be furnished him at the same time, which the defendant is to do, as directed by the court, or the same will not be permitted to be given as evidence on the trial.

It must be remembered that there is no reply except where the answer sets up new facts as a defence to the allegation or allegations of the complaint, or new facts as counter claim or claims founded on an account or written instrument, for the payment of money only, or a specified amount of property at a fixed valuation therein. It is incumbent on the plaintiff to prove the facts of every cause of action in his complaint which he expects to recover on, and, when the answer admits the cause of action, but sets up other facts which, if true, are a good and perfect defence to the whole or part of the plaintiff's claim, then the plaintiff not being obliged to reply to such facts, it leaves them controverted by the plaintiff, and the defendant under the necessity to prove them. Where the plaintiff claims an amount due on a note, a copy of which he annexed to his complaint, or left with the justice, and upon an implied contract for the value of brick, delivered to

the defendant, the defendant in his answer, if he wishes to controvert the note, must do so under oath, but may simply deny the other allegation or cause of action. This kind of an answer puts the proof of both allegations or causes of action upon the plaintiff. Then, if the defendant did not make the note, nor did not receive the brick, the verdict and judgment will be in his favor. But if he made the note but paid it, and received the brick but paid for them, and these facts are set forth in the answer here, although the effect of the note is denied yet the genuineness and due execution is not, therefore the answer need not be verified by the oath of the defendant. The fact of payment being a new fact not referred to in the complaint, and not requiring any reply from the plaintiff, the cause is at issue by filing the answer; and the answer in reference to the brick, whether the allegation in the complaint is controverted or admitted and new facts stated to avoid it or not, need not be verified by oath. But where the defendant had a perfect defence to the claim or claims of the plaintiff, and also had a note of the plaintiff of five hundred dollars which he wished collected, if he should set forth the same in the answer, this would be a counter claim, and he should annex a copy to the answer filed with the justice, and show, in pursuance to the order of the court, the original to the plaintiff, and also give a copy to the plaintiff. This note, not having anything to do with the cause of action in the plaintiff's complaint, and having no reference to the defences made by the defendant thereto, is like a new action in favor of defendant against the plaintiff; and if the plaintiff shall not deny the note and verify the same by affidavit, the note is to be considered as a valid claim against the plaintiff. But if the note was obtained by fraud, or was paid, the plaintiff will so state without affidavit, either in writing or to the justice, who will put the same down on his docket. This statement, if true, is a good defence to the note, and does not dispute the genuineness or due execution of it. But in case the defendant has set forth in his answer a counter claim, not founded on either an account or instrument in writing, for the payment of money only, but one founded upon the sale of a mule, this counter claim, not re-

quiring of the plaintiff a denial of it verified by affidavit, need not be replied to by the plaintiff, but the answer puts it in issue, and on the trial the defendant must prove the liability of the plaintiff to pay for the mule, or he cannot recover for the same.

In reference to actions on accounts and written instruments for the payment of money, for the delivery of a specified amount of goods at a specified price, whether proceeded on by the plaintiff or by the defendant as counter claims, their genuineness and execution must be admitted or denied; and if denied, they must be denied under oath. The knowledge of an account, and execution of note, bond, or bill of exchange, or other obligation, is in the person who received the goods forming the account, or executed the note, bill, bond, or other obligation; and unless he denied their genuineness or execution under oath, he shall not be permitted to do so at all; and juries and courts are required to treat them as valid claims, unless it is done.(*a*)

After the answer is made or filed, issue is joined, and then the court is to hear any objections which either party may urge to the pleadings, or any part thereof, of their adversary.

A valid objection to the pleading, or any part, is that it is not sufficiently explicit to be understood, or, although taken to be true, is no cause of action. If the court deem the objection good, it will so decide and order the pleading amended, which is to be accordingly done, or the defective pleading disregarded.

Any variance between the proof and allegation in a pleading will be disregarded, unless it misled the adverse party and was prejudicial to him. Amendments may be awarded at any time before the trial, when by them substantial justice will be promoted. But the court, in its discretion, may, as a condition, require the payment to the adverse party of the costs, not to exceed twenty dollars. An amendment is not to be made after a witness has been sworn on the trial, if thereby it should involve the necessity of an adjournment of the trial; but if the adjournment is not necessary, the amend-

(*a*) 2 California Statutes, 141, ch. 3.

ment can be made even after witnesses have been sworn on both sides. If, at any time before the trial, it appear to the satisfaction of the justice before whom the action is brought, by affidavit of either party, that such justice is a material witness for either party, or if either party make affidavit that he has reason to believe, and does believe, that he cannot have a fair and impartial trial before such justice by reason of the interest, prejudice or bias of the justice, the action shall be transferred to some other justice of the same or neighboring township; and in case a jury be demanded, and affidavit of either party is made, that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township against him, the action shall be transferred to some other justice of the peace in the county. The justice to whom an action may be transferred by the provisions of this section, shall have and exercise the same jurisdiction over the action as if it had been originally commenced before him. The justice ordering the transfer of the action to another justice, shall immediately transmit to the latter, on payment of costs, all the papers in the action, together with a certified transcript from his docket, of the proceedings therein. Upon the return day of the summons, if a jury be required, or if the justice be actually engaged in other official business, he may adjourn the trial without the consent of either party, as follows:

First. When a party, who is not a resident of the county, is in attendance, the adjournment not to exceed twenty-four hours; when the defendant in attendance is under arrest, the adjournment not to exceed three hours.

Second. On other causes not to exceed five days.

The parties may by consent adjourn the trial ten days.

Either party may have an adjournment without the consent of the other for a period of not over ten days, upon affidavit, made by himself or another, that he cannot proceed to trial for the want of material testimony which he expects to procure, and at the same time he is to consent that the opposite party may take the deposition of any of his witnesses in attendance, to be used as evidence on the trial; which testimony the court is accordingly to take, and on the trial

it is to be used, subject to any objections which might be urged if the witness or witnesses were produced and examined in person on the trial.

After the issue is joined, or at a time to which the case has been adjourned, either party may adjourn the case for a period of not over ninety days from the return of the summons, upon the party proving by his oath or otherwise that he cannot be ready for trial before the time he wishes the case adjourned to, for the want of material evidence, describing it, and that the delay has not been made necessary by any act or negligence on his part, since the action was commenced; and that he expects to procure the evidence at the time stated; and, in addition thereto, the party is to give an undertaking, with two sureties to be approved of by the court, to the effect that the undertakers will pay to the opposite party the amount of any judgment which may be recovered against the party applying for the adjournment.

Then is the time that either party may demand that the trial be by a jury. If they do not it is waived, and the trial will proceed before the court. But if a jury is demanded, the trial is to be adjourned; and if the adjournment is denied by either party, some suitable and reasonable time and place are to be fixed by the court, at which time the jury is to be summoned to attend. But if the parties are indifferent as to the time of trial, the court is to determine the time and place, and try the case that day, or within the two next days, and summon the jury accordingly. Unless the parties agree to a less number, the justice is to issue his order for twelve jurors to be summoned.(*a*)

MANNER OF SUMMONING A JURY.

The jury is to be summoned by the constable of the city or township, in pursuance to the order issued by the justice, by giving them verbal notice to attend as jurors, at the time and place named in the order. The constable is to return to the court a list of the names of the persons summoned, with

(*a*) 2 California Statutes, 141, ch. 3.

his certificate of the manner of service. The court is to call the list at the time of trial, and if any of the jurors fail to attend, without good cause shown, the court may in its discretion impose a fine of not more than fifty dollars on such delinquent.

MANNER OF FORMING JURORS.

If there is not a sufficient number of competent jurors in attendance, the justice is to order others, summoned from the vicinity and not from the bystanders, sufficient to complete the jurors.(*a*)

CHALLENGES TO THE JURY.

Each party has three peremptory challenges, and may, in addition, challenge any or all for cause. Challenges for cause are to be tried by the court in a summary manner, the court to examine the juror challenged and witnesses.(*b*)

GOOD CAUSE FOR CHALLENGE.

If a juror is not a citizen of the United States, or an elector of the county, or over twenty-one years of age, or in the full possession of his natural faculties, or has ever committed felony or a misdemeanor involving moral torpitude, or is related within the third degree to either party, or is standing in the relation of guardian or ward, master or servant, principal or agent, to either party, or a partner in business of either party, or being security on any bond or obligation for either party, or having served as a juror or was a witness for either party on a previous trial, between the same parties for the same cause of action, or having an interest in the event of the action or the main question involved in the action, or having formed and expressed an unqualified opinion as to the merits of the action, or having enmity or bias for or against either party. The case may be presented and commented upon to the jury after trial by either or both parties,

(*a*) 2 California Statutes, 144. (*b*) 2 California Statutes, 144.

or their agents or attorneys, and they may be charged upon the law by the court; after which, if they do not agree upon their verdict in presence of the court, they are to be placed under the control of the constable, and by him kept apart from all others until they agree upon their verdict, or are discharged by the court. They are not to be allowed anything to eat or drink while consulting on their verdict, without permission from the court. After they have agreed upon their verdict, they are to be brought before the court and deliver the same to the justice, who is to record it in his docket.

If, however, the jury cannot agree, and there is no probability that they will, the court may discharge them.

If the jury shall render a verdict, and it shall appear to the court that while they were consulting upon their verdict, either party shall have furnished them with something to eat or drink, or had conversed with them, or they had allowed additional evidence to be received before them, any of these things will vitiate the verdict and will be good cause for setting the same aside.

If, however, there are no objections to the verdict, the court is to enter judgment upon the same immediately.(*a*)

NEW TRIAL.

A new trial may be granted within ten days after the entry of judgment on motion. If it shall appear to the court that the party applying has not had a fair trial, on account of an accident or surprise which with ordinary prudence he could not have guarded against, or that excessive damages have been assessed against him, through the influence of passion, or that the evidence was insufficient to justify the verdict or decision, or that since the trial he has discovered new evidence, which with reasonable diligence he could not have discovered and produced on the trial; for any of these reasons the court can give the party applying a new trial, which

(*a*) 2 California Statutes, 76, 144; 3 California Statutes, 111.

if done, the former verdict and judgment are to be vacated and a new trial had.(a)

After the entering up of a judgment, either party can take an appeal to the county court, except for forcible entry and detainer only; in these cases the appeal is directly to the district court.

APPEALS.

The person who appeals is known as the appellant, the adverse party as the respondent.

APPEALS FROM JUSTICE'S COURT TO THE COUNTY COURT.

Any party dissatisfied with a judgment rendered in a justice's court, may appeal therefrom to the county court of the county, at any time within ten days after the rendition of the judgment.(b)

The appeal is to be taken by filing a notice of appeal with the justice, and serving a copy on the adverse party.(c)

An appeal from a justice's court will not be effectual for any purpose, unless an undertaking be filed, with two or more sureties, approved by the justice, in a sum equal to twice the amount of the judgment and costs, when the judgment is for the payment of money; or twice the value of the property added to twice the amount of the costs, when the judgment is for the recovery of specific personal property. The undertaking must be to the effect that the appellant will pay the amount of the judgment appealed from, or the value of the property specified in such judgment, as the case may be, provided the judgment shall be affirmed by the appellate court, together with the costs on the appeal. If the judgment appealed from, be other than for the recovery of money or specific personal property, the amount of the undertaking on appeal to stay proceedings, must be fixed by the justice, and must be to the effect that the appellant will pay all costs on appeal and all damages which the respon-

(a) 2 California Statutes, 149.
(b) Laws of 1853, ch. 178, sec. 16.
(c) Laws of 1853, ch. 178, sec. 18.

dent may sustain thereby, provided the judgment appealed from be affirmed.(a)

Upon receiving the notice of appeal, and the undertaking, and on the payment of the costs of the action, the justice is required to transmit to the clerk of the county court, a copy of his docket in the case, the undertaking filed, and the notice of appeal.(b)

The appellant is to furnish the papers to the county court duly certified by the justice, and then the appeal is ready to be heard, when the rules and business of the court will permit.(c)

There is one class of cases that justice's courts have jurisdiction to try, in which an appeal may be taken by either party, both from the law and the fact; and a new trial had in the appellate court. These are actions for forcible entry and detainer or forcible detention of lands, tenements, or other possessions.(d)

The appeal in these cases is perfected by giving the notice and undertaking, paying the fees of the justice's court from which the appeal is taken, and furnishing the appellate court with a transcript of the docket of the justice in the case.

DUTIES OF A JUSTICE.

The justice must keep a docket, and in it enter the title of every action or proceeding commenced before him, and the object of the action; and if for money, the amount of the demand, the date of the summons, the time of its return; and if an order to arrest the defendant was made, or a writ of attachment issued, then these facts are to be entered also; the time when the parties, or either of them appears, or their non-appearance; if default be made, a minute of the pleadings; if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleading; every adjournment—by whom application made, whether on oath, evidence, or consent, and to what time; the demand

(a) Laws of 1853, ch. 178, sec. 20.
(b) Ibid. sec. 19.
(c) 2 Cal. Stat., 150, 146, ch. 5.
(d) 3 Cal. Stat., 158, ch. 81.

for a trial by jury—when the same is made, and by whom made; the order for the jury, and the time appointed for the return of the jury; the names of the jurors who appear and are sworn; the names of all the witnesses sworn, and at whose request; the verdict of the jury, and where received; if the jury disagree and are discharged, the fact of such disagreement and discharge; the judgment of the court, specifying the costs included, and the time when rendered; the issuing of execution, when issued, and to whom; the renewals thereof, if any, and when made; any money received by him on the same, from whom, and at what time; the receipt of a notice of appeal, if any given, and by whom. All these different steps in an action, if taken, are to be entered under the title of the action to which they relate, and at the time when they occur. Such entries or transcript, certified by him or his successor in office, is primary evidence to prove the facts so stated therein.

The justice is to keep an alphabetical index, in which the names of the parties to each case must be entered, with a reference to the page of entry—the names of the plaintiffs to be entered in the index, in the alphabetical order of the first letter of the family names.

He is to pay over all money by him collected in his official capacity, to the persons entitled thereto, or authorize them to collect the same without delay; and by his failure to do so, he is guilty of a misdemeanor, and removeable from office.

WHO TO HAVE THE DOCKET.

The docket of a justice, upon the expiration of his time of office, must be by him deposited with his successor in office, together with those of his predecessor, if he shall have any; and in case the office becomes vacant by death, removal from the township or city, or otherwise, before a successor is elected and qualified, the dockets that were in the possession of such justice must be deposited with the county clerk of the county, to be by him delivered to the successor in office of the justice.

WHO IS SUCCESSOR.

Any justice with whom the docket of his predecessor is deposited may issue execution on a judgment therein entered not satisfied, in the same manner and with the same effect as the justice by whom the judgment was entered might have done.

Any person elected to fill an unexpired term is a successor, and when two or more are equally entitled to be the successor of a justice going out of office, or whose office is vacated, the county judge shall decide the question between the justices elected, and designate who shall be the successor of such justice, and make out his certificate to that effect, and have it filed with the county clerk.(*a*)

THE POWERS OF JUSTICES.

A justice may appoint an individual to serve process, either summons or execution, with or without an order of arrest, and with or without an attachment. Such deputation is to be in writing on the process. He may issue final process on any judgment recovered therein, to any part of the county.

These courts may issue commissions to take the depositions of witnesses out of the state, and to settle interrogations to be annexed to the commission, and direct the manner of its return; may issue subpœna for witnesses to any part of the county, in an action or proceeding pending before them; may also issue subpœna duces tecum, to compel the witness to bring with him papers, &c., to be used as evidence on the trial.

The justice is to receive all moneys collected by the sheriff or constable of his county, on process or order issued by him in his official capacity.

The justice can punish persons for contempt, where the individual is guilty of disorderly, contemptuous, or insolent behavior towards the justice while holding court, interrupt-

(*a*) 2 California Statutes, p. 146, ch. 5.

ing the due course of a trial, or judicial proceeding before him.

For breach of the peace, boisterous conduct, or violent disturbance in presence of the court, or in the immediate vicinity, tending to interrupt the due course of a trial or other judicial proceeding.

Disobedience or resistance to the execution of a lawful order or process made or issued by him. Disobedience to a subpœna duly served, or refusing to be sworn or answer as a witness.

Rescuing any person or property in the custody of any officer, by virtue of an order or process of his court.(*a*)

TRIAL AND PUNISHMENT OF CONTEMPT.

When a contempt has been committed in the immediate view and presence of the court, it may be summarily punished. But when it is not committed in the view of the court, a warrant may be issued, and the person or persons guilty of the contempt may be arrested and brought at once before the court. In those cases, where the court must rely upon testimony to ascertain who are guilty, there is to be a trial to determine the facts of guilt of the person arraigned as the offender, after which the court is to hear what the defendant has to say in his defence or excuse, and then to decide whether he will discharge or convict him. If convicted, it then becomes the duty of the court to inflict punishment according to the character of the offence. The court is authorized to inflict a fine of any amount not over one hundred dollars, and imprisonment for any time not over one day; either or both at the discretion of the court. The proceedings of the arrest, trial, conviction, and judgment, together with execution, are to be entered in the docket.

AS TO THE JOINDER OF ACTIONS.

All causes of action which a plaintiff may have against a

(*a*) 2 California Statutes, p. 146, 132, 133, 147, 8, 9.

defendant, arising out of contracts between them, either express or implied, may be included in one action. And, in the same way, the defendant may include in his answer all the causes of action he may have against the plaintiff, growing out of contracts express or implied. As for example, suppose the plaintiff has a note-book account and balance due him of two hundred dollars, upon a contract for building a stable, against defendant, all must be brought in one action. And suppose the defendant is sued on a note of four hundred dollars, and he has against plaintiff a book account of three hundred dollars, bill of exchange, and an amount due him on contract for digging a cellar of forty dollars—all these causes of action must be included in one answer; and after the plaintiff shall establish his note, the defendant is to establish his claims, which, when done, will entitle the defendant to fifteen dollars and costs of suit.

The plaintiff may have a cause of action against the defendant for personal property, and one for the damages to the property, and one for detaining the property; all three causes must be included in one action, and be so stated in the complaint.

All causes of action arising out of injuries by the defendant to the person of the plaintiff, upon, or for, forcible or unlawful detention; actions for forcible entry, or unlawful entry, of lands, tenements, and other possessions, and damages for detention thereof, are to be included in one action.

Actions to recover possession of a mining claim, and damages for the detention of it, from the time the plaintiff was entitled to its possession until he gets it, must be included in one action.(*a*)

If the plaintiff has several causes of action against a trustee, arising out of contract or by operation of law, all must be included in one action against him.

If the same plaintiff and same defendant have two or more actions pending in the same court, and the causes of

(*a*) 2 California Statutes, 149.

action in favor of the plaintiff could be included in one, the court may order them consolidated in one action; and so also in case the defendant's causes of action in his favor, against the plaintiff, can be included in one defence.

Any person against whom another alleges he has a claim for money or property, may bring a suit to determine the alleged claim in such action, and the plaintiff may compel the defendant to substantiate his alleged claim, if not, the court is to render a judgment in the matter.

Where a person is security for another, an action may be brought by the security against the principal and the creditor, to compel the principal debtor to pay, and the creditor to collect the debt, on account of which the plaintiff is liable as security.(*a*).

ONE CLAIM TO BE SET OFF AGAINST ANOTHER.

Where the plaintiff has claims against the defendant, who is also in possession of claims against him, after the plaintiff brings suit on all his claims against the defendant, the defendant brings in all his claims against the plaintiff. Now, the character of the claims for which the plaintiff can sue the defendant in one action, include several kinds, but they all grow out of contract express or implied, such as note, bill of exchange, account, contract for the delivery of a specific amount of goods at a specific price named in the contract, and due at the time suit is brought.

The claims which the defendant has the right to set off against these claims are those growing out of contracts express or implied, and due at the time suit is brought; and after the court or jury pass upon them, the amount due each from the other is to be ascertained and set forth in the verdict, striking the balance which shows for whom and how much the judgment should be entered for.(*b*)

(*a*) 2 Cal. Stat. p. 141, c. 3. (*b*) 2 Cal. Stat. p. 58, s. 48, p. 142, s. 574, 576.

COUNTER CLAIMS OR SET-OFFS.

Many cases arise between an assignee of a thing in action and the obligor.

In reference to negotiable promissory notes and bills of exchange in the hands of an assignee, for a valuable consideration received by him from the assignor in good faith, before maturity, no question or dispute can occur. But in reference to those received by the assignee after maturity, any set-off or defence which the obligor had at the time he received notice of the assignment, can be made by the obligor against the assignee, as well as if suit had been brought by the original payee of the note or bill of exchange.

As to any other thing in action, such as notes not negotiable, contracts for the payment of money, accounts, &c., the assignee stands precisely in the place of the assignor or original party; and the defendant in a suit by an assignee founded thereon, is entitled to set off, in that action, any claim in his favor against the original party which he had before notice of the assignment, as he could if the suit was by such original party. As, for example, the plaintiff was assignee of a note, not negotiable, for $500, payable to A., indorsed by A. to plaintiff for good consideration and in good faith. Before the defendant knew of the assignment, he paid to A. $300, and allowed A. to run up an account on his books for $200; proof of the payment and account is a good defence to the action. But suppose no payment was made, over and above the book account, the assignee would be entitled to recover the amount of the note after deducting the account.

But in reference to set-offs between the original parties to an action, it must be remembered, that causes of action growing out of contracts express or implied, may be joined together in one action; all of which may be defended by the defendant by as many defences to each cause of action as he may have. In addition thereto, the defendant may present in his answer in the same action, as many causes of action growing out of contracts express or implied, as he may have against the plaintiff; and upon the plaintiff and defendant's

claims being passed upon and counted up, the defendant has the right to set off as much of his demands against the plaintiff as will compensate and equal the demands of the plaintiff against him. Now the demands which can be sued upon in one action, are such as may be sued separately, and judgment had upon each; and must be due at the time of the commencement of the suit; and those which the defendant can present as set-offs to them must be of the same character, and be set forth in the answer as counter claims.

The claims that can be set off against each other must exist in the same right, that is, the claims must be coming from defendant to plaintiff, and from plaintiff to defendant, except where a person sues in a representative capacity; there the claims in favor of and against the intestate or ward, and defendant, can be set off against each other. The same rule holds, when a representative is a defendant.

If there are mutual demands between partners and a third person, and one of the partners is dead, the survivor can set off the claim in favor of the firm against the third person's claim, as surviving partner.

If an agent is indebted to another and conceals his agency, and the creditor buys goods of the agent belonging to the principal, thinking they were the agent's, the creditor, in a suit brought against him by the principal for the goods bought, can set off his claim against the agent.

The defendant must file his answer, if the counter claim is not founded on a written instrument for money, or a specified amount of property at a fixed price named in it, or on an account. If, however, the counter claim is founded on a written instrument for money, or a specified amount of property, or on an account, the original or copies must be left with the answer; and the defendant must make good any objections which may be urged by the plaintiff against his counter claim or set-off on the trial. In this proceeding the defendant acts as a plaintiff. But the plaintiff, on account of his being such, is excused from filing or putting in any answer or reply to the defendant's claim, as he would be bound to do if the defendant had prosecuted an action for it; so that the defendant must be prepared on the trial to make

good his claim against any objection the plaintiff may urge there against a recovery on it.

The claims spoken of, growing out of contracts express or implied, are not to be understood as liquidated claims, their amounts settled and fixed as a debt, but may be unliquidated claims, their amounts not as yet ascertained; but they must be for the breach or violation of a contract express or implied, which upon the trial is to be ascertained or assessed by the jury or court, as the case may be.

There can be no set-off in actions for the taking and detention of personal property, for injuries to persons, for injury to personal or real property. The defences in these cases must depend upon something arising out of the subject of the suits, or connected therewith.(*a*)

REMEDIES.

The remedies administered by these courts in favor of a creditor, extend in contract claims to five hundred dollars and interest.(*b*) A creditor having a claim within the jurisdiction of a justice's court, may sue the same by presenting his claim to the justice in writing or orally, and have a summons issued thereon immediately.

First, if the claim is founded on a contract either express or implied, and for the direct payment of money sometime after the 1st day of July, 1851, mortgaged on and payable in the state, and is not secured by real or personal property; or secondly, in an action upon a contract against a non-resident; the plaintiff can have an attachment issued at the time of issuing the summons, and have the defendant's real and personal property, not exempt from execution, attached for the security of his debt, unless the defendant shall give security for the payment of the judgment rendered in the case.(*c*) To obtain this writ, the plaintiff, or some person for him, must testify by affidavit, showing the character of the debt, amount thereof and time when due, and file the same with the justice; and in addition, must execute

(*a*) 2 California Statutes, 58. (*b*) 2 California Statutes, 134, 153.
(*b*) 2 California Statutes, 138, 139, 66, secs. 124 to 141.

a written undertaking, with two or more sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment. The writ of attachment is to be issued and delivered to the sheriff or constable for execution. The writ must be immediately executed, and the property of the defendant, liable for execution, attached, if he does not at once give an undertaking with two sufficient sureties in an amount to satisfy such demand. If the undertaking is executed and delivered to the officer, the attachment is not to be served. But, if the defendant fails to give the required undertaking, the attachment is served by the officer having the writ, on property sufficient to satisfy the demand and costs. The writ is to be served on real property by leaving a copy of writ with the occupant of it, but, if no occupant, then by posting a copy on a conspicuous place thereon, and filing a copy and description of the property, with the recorder of the county. Personal property capable of manual delivery, by taking it into custody. Stock or shares, or interest in stock or shares, of any corporation or company, by leaving copy with the president or other head of the same, or secretary, cashier, or managing agent, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ.

Debts, credits, and other personal property not capable of manual delivery, by leaving with the person owing such debts, or having in his possession, or under his control such credits or other personal property, a copy and notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ. The plaintiff may, by giving the officer notice in writing, require the writ served on any person owing a debt, or having a credit to the defendant, or has under his control other personal property belonging to the defendant, subject to the attachment. Upon receiving such notice, the officer is bound to serve the attachment as required, and the person on whom the writ is served, if he has in his

hands, or under his control, credits or other personal property belonging to the defendant, at the time of the service of the writ, shall be, unless such property be delivered over or transferred, and such debts paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged, or judgment recovered by him be satisfied. The person having such property, or being indebted to the defendant in attachment, may be examined under oath, touching the same, by the court, at the instance of the plaintiff. The defendant may be required to give information touching his property, under oath, before the court. The court, after an examination of the party having property in his hands belonging to the defendant, may order the property to be delivered into the hands of the constable, if the same is capable of delivery, upon such terms as may be just and reasonable.

The constable must make a full inventory of the property attached, and return the same with the writ.

The constable serving the writ, is authorized to require all persons having rights, credits, or debts due and belonging to the defendant, to furnish a memorandum of the same, stating the amount and description thereof; and, in the event that the information is not furnished to the constable, the persons refusing are to pay the costs of any proceeding taken for the purpose of obtaining the information.

The personal property attached, that is perishable, is to be sold in the same manner the same description of property is sold by law on execution. The proceeds and the other property attached, are to be kept by the constable to answer any judgment that may be recovered in the action. The constable is to collect the debts and credits without suit, if it can be done at once, and his receipt is a full discharge in favor of the person paying.

If any of the personal property attached be claimed by a third person, the constable is to summon a jury of six men to try the validity of such claim, and after the jury shall be summoned, the constable is to give notice to the plaintiff of the time and place of trial, who may appear and contest the claim before the jury. The jury and witnesses are to be

sworn by the constable, and if the verdict of the jury is in favor of the claimant, the constable is to relinquish the property from the attachment, and deliver the same to the claimant, unless the plaintiff give him a sufficient indemnity for proceeding thereon. The claimant, if he fail, is to pay the fees of jury, constable, and witnesses; but, if in his favor, to be paid by the plaintiff. On the trial, the claimant and defendant may be examined as witnessses.

If the plaintiff recovers judgment, the same is to be satisfied out of the property attached by the constable in the case, together with the costs.(*a*)

There are certain cases in which the creditor can procure an order of arrest against his debtor.(*b*)

They are cases where the action is founded upon a contract express or implied, for the recovery of money or damages, when the defendant is about to depart from the state to defraud his creditors.

Where the demand is a fine or penalty, or for money or property embezzled, or fraudulently misapplied or converted to the defendant's own use, such as money received by an attorney, factor, broker, agent, clerk, in the course of their employment as such, or by any other person in a fiduciary capacity.

When the action is for a wilful injury to the person, or for taking, detaining, or injuring personal property.

Where the defendant was guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought.

Where the defendant has removed, concealed, or disposed of his property, or is about to do so, with intent to defraud his creditors.

But before the order of arrest is issued, the plaintiff must prove, by his or some other person's affadavit, to the satisfaction of the justice, the facts entitling him to the order of arrest, and in addition thereto, is to execute and deliver to the justice an undertaking, with two or more sureties, to the effect that if the defendant recovers judgment, the plaintiff

(*a*) 2 Cal. Stat, p. 138, 69. (*b*) 2 Cal. Stat., p. 137, sec. 544, 5.

will pay to him all costs that may be awarded to the defendant, and all damages which he may sustain, by reason of the arrest, not exceeding the sum named in the undertaking.(a)

The undertaking must contain two hundred dollars, at least, for the defendant's protection.

The order of arrest is to be indorsed on the summons, and when executed, the defendant is to be taken before the justice who made the order; but if he is absent or unable to try the action, or is incapacitated on account of being witness for defendant, then the officer is to take the defendant before the next justice of the city or township, who is to take cognizance of the case, and proceed in it as if the action had been commenced before him, and the arrest made in pursuance of his order.

So soon as the arrest has been made, it is the duty of the officer making it to give notice thereof to the plaintiff.

The defendant, after the arrest, can demand a trial immediately, which must be had within three hours after the demand, except there is a trial of another action pending at the time. In case the delay is longer than three hours, and not occasioned by any other trial, the order of arrest is at an end and does not operate any longer; the action, however, may proceed; and in the event of a judgment in favor of the plaintiff, he may get out another order of arrest on the writ of execution, if the facts of the case show he is entitled to it. But in case the defendant shall require an adjournment, he is entitled to it, on executing and filing with the justice an undertaking, with two or more sureties to be approved of by the justice, to the effect that he will render himself amenable to the process of the court pending the action, and such as may be issued to enforce the judgment that may be rendered against him in the action, or that the sureties will pay the plaintiff the amount of such judgment. Upon this being done, the court is to order the defendant discharged from arrest.(b)

In actions to recover the possession of specific personal property, the plaintiff at any time before the answer of the

(a) 2 California Statutes, 137. (b) 2 California Statutes, 137.

defendant has been made or filed with the justice, may demand the delivery of the same to him to entitle him to the possession of the property; the plaintiff, or some person for him, by affidavit, must show that the plaintiff is lawfully entitled to the possession of the same; that it is wrongfully detained by the defendant, and the reason the defendant detains it, to the best of his knowledge, information and belief; that it has not been taken for a tax assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or if it has been seized that it is by statute exempt from such seizure, and the actual value of such property.(*a*)

The justice, by an order indorsed on the affidavit in the case, directs the constable to take the property from the defendant, on receiving from the plaintiff an undertaking such as is provided by law, and deliver the same to the plaintiff if the defendant does not execute an undertaking entitling him to the possession of the property until the termination of the action.

THE UNDERTAKING OF THE PLAINTIFF.

The plaintiff's undertaking is to be executed by two or more sureties, approved by the constable, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action, for return of the property if return be adjuged, and for the payment to the defendant of such sum as may, for any cause, be recovered against the plaintiff in the action.(*b*)

HOW ORDER EXECUTED.

Upon receiving the affidavit, order and undertaking, the constable is to take possession of the property, from the defendant or his agent, and retain it in his custody, and without delay serve copy of the affidavit, order and undertaking on the defendant, personally, if he can be found in the

(*a*) 2 California Statutes, 139. (*b*) 2 California Statutes, 139.

county, or personally to the agent from whom he took the property, or if neither can be found in the county, then by leaving them at the usual place of abode of either, within the county, with some person of suitable age and discretion; or if neither have any place of abode within the county, then by putting the same into the nearest post-office, directed to the defendant.(a)

After the property is in the custody of the constable, he is to hold on to the same for two days at least, to allow the defendant to give to the officer an undertaking, with two or more sureties, in double the value of the property fixed by the affidavit of the plaintiff, to the effect that if the delivery of the property shall be adjudged in favor of the plaintiff, and the payment to plaintiff of any sum of money by the defendant, that the delivery and payment shall be made, or sureties liable to pay on account thereof the sum named in the undertaking. If the defendant shall execute and deliver to the officer such an undertaking within the two days, the officer is then to require the sureties of the defendant to justify before the justice; but, before that is done, notice thereof is to be given to the plaintiff by the constable, so as to enable the plaintiff to be present at such justification; and upon the justification of the defendant's sureties, or others in their place, the constable is to deliver the property to the defendant, unless some third party lays claim to the same; but where the defendant fails to do so, and no third party lays claims to the property, the same is to be delivered to the plaintiff. Where, however, the defendant does not wish to give the undertaking, and take possession again of the property, he has two days, after receiving copy of affidavit, order and undertaking, to except to the sureties of the plaintiff, which, if he does, the officer is to require the plaintiff to have his sureties justify before the justice. Notice of the time and place is to be given to defendant, that he may be present when it is done. Upon the justification of the plaintiff's sureties to the acceptance of the justice, and the receipt of his fees and expenses, the constable is to deliver the pro-

(a) 2 California Statutes, 139.

perty to the plaintiff, unless claimed by some third party.(a) If the defendant does not give an undertaking, justify sureties, and take the possession of the property again, nor shall not, within two days, except to the sureties of the plaintiff, and no third party lays claim to the property, the constable, upon receiving his fees and expenses for keeping the property, is to deliver the same to the plaintiff.(b)

HOW THE PROPERTY TAKEN BY CONSTABLE MAY BE CLAIMED BY A THIRD PARTY.

After property has been taken by a constable, in pursuance of an order made by a justice, any person having a claim to the same, other than the plaintiff or defendant, or defendant's agent, such person must make affidavit of his title to such property or right to the possession, and therein state the grounds of such title or right, and serve the same upon the constable; upon that being done, the constable is to give notice to the plaintiff of such claim being made. The plaintiff, on demand being made for that purpose, must indemnify the constable against such claim, by giving to him an undertaking, with two or more sureties, in double the value of the property named in the affidavit of the plaintiff, accompanied with the affidavit of such sureties that they are each worth double the value of the property, as specified, over and above their debts and liabilities, inclusive of property exempt from execution, and are freeholders or householders of the county.(c) Upon that being done, the constable will proceed and deliver the property to the party entitled thereto, as if such claim had never been made; and any person, other than the plaintiff or defendant, and defendant's agent, having claim to property taken by the constable, unless they make it in that way, shall not be valid as against the constable.

The constable is to return the order and affidavit, with his proceedings thereon, to the justice, within five days after taking the property.

(a) 2 California Statutes, 140.
(b) 2 California Statutes, 140.
(c) 2 California Statutes, 140, 141.

WHO CAN BE SURETY.

Any person who is a resident and house-holder or free-holder of the county, and worth double the amount named in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution.

HOW TO JUSTIFY.

Each of the sureties to an undertaking must attend before the justice, at the time named in the notice, and be examined by the adverse party, touching their sufficiency, in such manner as the justice may think it proper; and if required, the examination of each surety is to be reduced to writing, and subscribed by him. If, on the examination, the justice find the sureties sufficient, he must annex the examination to the undertaking, and indorse his allowance thereon, and file the same. Upon that being done the constable is exonerated from all liability on account thereof.(*a*)

WHO CAN BE A WITNESS.

Any person may be summoned before a justice's court as a witness residing in the county.

A person of unsound mind at the time he is called to testify, is not a good witness; nor is a child under ten years of age, who appears incapable of receiving just impressions of facts respecting which it is examined, or of relating them truly.

In an action where a white person is a party, an Indian, or person having one-fourth or more of Indian blood, is not a good witness, and cannot be examined.

In an action where a white person is a party, a negro, or person having one-half or more negro blood, is not a good witness.

A husband or wife cannot be examined as witness for or against each other; nor after the marriage contract has been

(*a*) 2 California Statutes, 140, 141.

dissolved, can either testify as to communications made during marriage, without the consent of the other. They can be witnesses in a case where one sues the other.

A counsellor or attorney cannot, without the consent of his client, be examined touching any communication made to him by his client, and his advice thereon in the course of professional employment.

A priest or clergyman cannot be examined touching any confession made him in his professional character, in the course of discipline enjoined by the church to which he belongs, unless by the consent of the person who made the confession.

A licensed physician or surgeon cannot testify to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient, unless the patient consents to the same.

A public officer cannot be examined as a witness, touching communications made to him in official confidence, when the public interest would suffer by the disclosure.

The justice or any juror may be called as a witness by either party; but then, if he is a witness, the court can exercise a discretion whether he will allow the trial to proceed before him or not. And if a juror is called as a witness, the court is to determine whether the trial shall suspend or not. If the justice is a witness, he can direct the trial to be postponed and tried defore another justice. If a juror is a witness, he can dismiss the jury and try it before another jury, as may seem fair and just to him.

If a witness does not understand how to speak the English language, an interpreter must be sworn, who is to interpret for him.(*a*)

(*a*) 2 California Statutes, 113 to 120.

CHAPTER V.

CONTRACTS, DUE BILLS, BILLS OF EXCHANGE, &c.

A contract, to be valid, must be between parties able to put themselves under legal obligation.(*a*) A person of age, under no restraint, not an idiot, insane, lunatic, or drunk, and a woman not married, can enter into a contract. A contract entered into between two such persons, at the instance of each, and founded upon a valuable consideration, is a binding contract.(*b*) A married woman is precluded from contracting unless she is a sole trader. A minor's contracts with adults are binding on the adult who contracted with him; but the legal obligation of the contract on his part is suspended until he arrives at age, and either affirms or rejects it.(*c*) A minor who enters into a contract with an adult says to him, I hold you bound by the contract, and before I bind myself to it I will consider of it until after I am of age, and then I will tell you whether I will hold you or release you from it. It is a binding proposition on the part of the adult, giving the minor until his majority to accept or reject it.(*d*) A minor is not allowed to shield himself behind the plea of minorship, and to cheat adults out of their property. Where goods are sold to a minor, if he repudiates the contract, he must return the goods, and the title vests in the seller again. If he leased land while a minor, and occupied it after coming of age, he is liable for the rent for the time he occupied after majority. If he received rent for property, or interest for use of money, while a minor, he cannot repudiate the contract,

(*a*) 2 Kent's Com. p. 563.
(*b*) 3 California Statutes, 101.
(*c*) 2 Kent's Com. p. 245, 248.
(*d*) 2 Kent's Com. p. 248, 251.

or receipt and collect the same over again. If he rejects an executed contract, the consideration must be returned—he cannot reap the benefit and avoid the contract.

But there are two exceptions to the general rule that minors cannot contract. The one case is contracts for apprenticeship. Minors can bind themselves as apprentices for seven years by deed, if the seven years are within their maturity. The other case is in contracts for necessaries. What are necessaries is frequently a question hard to resolve. What would be necessaries for one, would not be for another. Necessary boarding, clothing, and lodging, and medical attendance in sickness, tuition of necessary teachers—these are necessaries. The age and sex of the minor, the real station in society, property and business or vocation selected for life, all these things are necessarily involved in the question.(*a*)

A married woman may contract along with her husband to incumber or pass his property, but she has no power to contract without him.(*b*) When necessaries are given her, under such circumstances that the husband is liable, she is the same as the duly authorized agent of her husband, with authority to bind him to that extent; which authority the law will not permit him to revoke: for he gave it to her at the time he made her his wife.

A contract is to do, or to abstain from doing, a thing, and is either executed or executory. The thing to be done, or the matter of the contract, must be lawful—one not contravening or in fraud of the laws of the government, or rights of her citizens, one not in violation of good morals, and one not in violation of public rights, or opposed to the national policy. Contracts in fraud of the government, are such as contracts to smuggle goods in violation of the laws. Contracts in violation of good morals are such as those for future illicit cohabitation or prostitution, the printing or circulation of irreligious and obscene publications, to promote or reward the commission of crimes, to corrupt or evade the due administration of justice, to cheat the public agents or defeat public rights, and all acts founded in moral turpitude and opposed

(*a*) 2 Kent's Com. p. 251, 256. (*b*) 1 California Statutes, 254.

to the good order and interests of society. Contracts in violation of public rights or opposed to the national policy of government, are such as contracts for money and munitions of war, to be used against a nation with which we are at peace, and any contract for means to accomplish, or acts in violation of an impartial neutrality with a government or state with which we are at peace, or contravening a treaty between our government and another. There is no particular form for contracts according to the laws of this state.(a) The contract is to express the terms of the contract clearly; what is to be done by each, or what has been done by one, or is to be done as the consideration and moving cause for what the other is to do. The formalities of a contract to pass personal and real property have been treated of in another part of this work, and will not be here discussed. The consideration upon which a contract is founded, in many cases is the contract or promise of the other party to the contract to do some act, after which the obligation is perfect on the part of the other to perform his contract; these are dependent contracts. Where the acts to be done on the part of both parties to the contract, are to be done at the same time, these are concurrent contracts. Dependent contracts are such as where one party contracts to build a house, and after the performance of that act by him, the other party contracts to pay him a certain sum of money therefor. Concurrent contracts are such as where one contracts to deliver a hundred barrels of flour for a certain sum of money; the delivery and payment are concurrent contracts, because the acts contracted to be done are to take place at the same time.

There are contracts not expressed, but their terms or the things to be done, must be clearly implied.

All contracts binding between the parties to them, must be founded in sufficient legal consideration. The consideration must be granted at the request of him who makes the contract to do or abstain from doing a lawful act. The consideration is one thing, the request another.

A legal consideration for a contract may be either execu-

(a) Story's Conflict of Laws, s. 244, 246, 258, 259; 2 Kent's Com. p. 571.

tory or executed. An executory consideration is that where the party is to give, or do it, or abstain from giving or doing it, in the future. An executed consideration is where it has already been given, done, or abstained from.

The consideration contracted to be done or abstained from in the future, or already given or abstained from, must be valuable to the party making the contract: such as money, property, or labor; and the act abstained from or to be abstained from, must be beneficial in preventing the promisee from incurring a liability, or subjecting the promisor to an inconvenience or injury. A void contract is not a valuable thing; therefore it will not do to form a new contract on; but money or property given, and a contract founded thereon, either express or implied, being valid and binding upon the party before it became barred by the statute of limitation, is a good consideration to found a contract on. So, too, where money is lent to the contracting party, and the contract and securities given by him therefor are illegal on account of usury or the statute of frauds, yet, if the parties destroy the illegal contract, and make another founded on the money received by him, the money so received is a valuable consideration to found a good contract on. The contract was the illegal thing; that being abrogated, left the party receiving the money under an implied legal obligation to pay the party giving him the money, that amount with legal interest for its use. And if the new contract so founded is legal, it becomes binding upon the party making it. But the illegal contract would not be a good consideration, because, while it is existing between the parties, it is of no binding force, is void, and of no value, and therefore is not a valuable consideration. Parties may make an illegal contract founded upon a good or valuable consideration, and when the illegal contract has been rescinded or abrogated, the consideration stands between them without taint or blemish from such void or illegal contract, and is a good consideration to found a legal contract on.(*a*)

The thing must be given, done, or abstained from being

(*a*) 2 Taunt, 184; 2 Stark, 9.

done, or contracted to be given, done, or abstained from, at the request of him who makes the contract. A contract to pay the debt of another, must be upon a new consideration. The consideration upon which the debt was founded, although good and valuable between the debtor and creditor, was given at the request of the debtor, and the contract to pay such debt for the debtor, must be founded on a new and valuable consideration. The request is either expressed or implied. Where the consideration is done or contracted to be done at the time of the contract, there the request is expressed. But if the consideration has been given or executed, there the request must be shown. It is implied, where the party making the contract was under legal obligation to do the same thing; as where a surety pays his principal's debt, and afterwards brings suit to recover the same from the principal, the request to pay will be implied; for the thing done, placed the person under such legal obligation that the request to do it is necessarily implied. If A. requests B. to deliver goods to C. in order to fix A.'s liability for the goods, the request from A. to B. must be affirmatively shown; but, if the goods were delivered and used by the family of A., there the request from him would be implied.

A contract to pay the debt of another must not only be founded on a good and new consideration, but it must be reduced to writing, and the consideration must be named therein, and the contract must be signed by the party bound thereby. In this way, a contract of that nature is valid. All contracts, where they are not to be performed within the year, or in consideration of marriage, must be reduced to writing, and the consideration must be named therein and signed by the party bound thereby, except mutual promises to marry.(*a*)

A contract under seal implies a consideration, and none need be shown to entitle the party to recover.(*b*) Transfers of, and liens created on real and personal property, are by instruments not under seal.(*c*)

(*a*) 1 California Statutes, 267.
(*b*) 2 Kent's Com. p. 584.
(*c*) 1 California Statutes, 267.

The consideration of notes negotiable may be questioned between the payor and payee, but not between the payor and indorsee for a valuable consideration, before maturity. The consideration of a bill of exchange may be questioned as between the drawer and acceptor, but cannot as between the indorsee for valuable consideration and indorser, drawer and acceptor.(c)

Promissory notes are in all respects like inland bills.

A bill of exchange, when drawn and accepted, is the contract of two persons in favor of the holder. The drawer contracts with the payee that the drawee will accept and pay it according to its terms. The drawee, if he accepts, contracts with the payee to pay the same on account of the drawer. If the payee indorses it, he contracts with the indorsee that the acceptor of the bill will pay it to the indorsee, and if indorsed again, there is the same contract on the part of the indorser in favor of his indorsee. If the bill is drawn in France, upon a drawee in San Francisco, and in favor of a payee of England, who in England indorses it to another in England, and the bill is accepted in San Francisco, the contract of the acceptor is a California contract, the drawing is a French contract, and the indorsing an English contract. The damages allowed by France on bills of that character for their protest, is recoverable against the drawer in favor of the holder; that allowed by England the indorser is liable for; that allowed by California the acceptor is liable for.(b) Drawers, acceptors, and indorsers upon bills drawn or negotiated in California, are liable for damages as follows, viz: a bill drawn on a person in the United States, east of the Rocky Mountains, fifteen per cent. on the sum named in the bill, and twenty per cent. on all bills drawn upon persons in foreign countries, which includes all costs of protest, interest, &c., up to and after the maturity of the bill, after which the holder is entitled to recover the amount named in the bill, and damages and interest thereon. If the interest is not determined by the contract of the parties, it

(a) 2 Kent's Com. p. 584. (b) Story's Conflict of Laws, s. 241; 2 Kent's Com. p. 565.

will be at the rate of ten per cent. per annum. If the bill was for money of the United States, the amount due on the bill is to be determined without reference to the value or difference of exchange between the state and the place upon which the bill was drawn at the time of protest for non-payment. But if the bill calls for the money of account or currency of any foreign country, then the amount due on the bill is to be determined by the rate of exchange or value of such foreign currency at the time and place of protest, the interest to run from protest for non-acceptance. The damages allowed are only in favor of a holder who purchased it, or some interest therein, for a valuable consideration.(*a*)

The acceptor is not bound unless he accept the same in writing, signed by himself or his lawful agent. Where the acceptance is written on a separate piece of paper, it is not binding upon him, except in favor of a holder who received the bill upon the faith thereof, for a valuable consideration. An unconditional promise in writing to accept a bill before drawn, is a good acceptance in favor of any person who, upon the faith thereof, received the bill for a good consideration. The acceptance is to be written on the bill, and where the drawee refuses so to accept it, the same may be protested for non-acceptance. Where the holder of a bill shall deliver it to the drawee for acceptance, and he fails to return it within twenty-four hours thereafter, or within such other time as the holder may allow, accepted or not accepted, the drawee is liable as acceptor on the bill. He is also liable as acceptor where he destroys the bill intentionally. Notice of protest is given by sending written notice to the parties to the bill or note, stating that the holder demanded acceptance or payment thereof of the drawee, and it was refused, and that the holder looks to him for payment of the same. The notice is to be sent to him by mail to the place of his residence, at the time of making, drawing, indorsing, or accepting the bill or note—unless such person, at the time of fixing his signature to such bill, note, or other negotiable instrument, shall specify the post-office to which he requires notice to be addressed.(*b*)

(*a*) 1 California Statutes, 147. (*b*) 1 California Statutes, 247.

There are three days of grace allowed for the payment of all negotiable paper except sight bills, checks or drafts; and when either a Sunday, first of January, fourth of July, or twenty-fifth of December, intervenes in the days of grace, it is to be counted in making the days of grace. If the last day of grace of a bill or note falls on either of those days, the bill or note matures and is payable on the day before, and if not paid it must be protested on such day.(*a*)

There is another class of instruments made assignable by the law, and which require some attention; they are bonds, due bills, and all instruments of writing not negotiable: these instruments, whether payable in money or property, or due in money or property, are assignable, and the assignment transfers the rights of the payee or obligee to the assignee; and such assignee may demand payment, and on refusal may bring action in his own name as if the instrument was negotiable and negotiated to him; but all equities in favor of the obligor or maker, and against the payee or obligee, up to the time of notice of the assignment, will apply in their favor as well as if in the hands of the obligee or payee.

Where such instruments call for personal property and no place is designated for delivery, the known residence, if any, in the county, of the payee or obligee, at the time of the execution of such instrument, is the place of delivery, whether the instrument has been assigned or not. Where no place of delivery is fixed, and the property is too ponderous to be easily removed, or the payee or obligor did not at the time of the execution of the instrument have a known place of residence, the place of delivery is at the residence of the obligor or maker. A tender of the property called for in the instrument at such places, exonerates the maker or obligor of his liability, and vests the property in the holder of such instrument. When the property called for is of a perishable nature, or the owner of such instrument is absent at the time of the tender, then the obligor or maker making the tender is to preserve, feed, or otherwise take care of the same; and for such reasonable care and expense the owner is liable, and

(*a*) 2 California Statutes, 522; 3 Kent's Com. p. 101.

the obligor or maker is entitled to possession of such property until paid.

All persons assigning such instruments are liable to the assignee or assignees on failure to collect the money or property called for by the instrument; but to fix the liability of the assignors in favor of the holder, the holder must, within sixty days after the maturity of such instrument, bring an action against the maker or obligor, and prosecute the same to judgment and execution, and on failure to recover, the assignors, or either of them, are liable to the holder.

Where the obligor or maker, at the time of the maturity of such instruments, or within twenty days thereafter, shall have left the state, or absconded, or the institution of suit unavailing, the holder can recover on the instrument from any of the indorsers standing before him. The first assignor is liable to the second, and so on *ad infinitum.*

The executor or administrator of obligors, makers and assignors are liable, and suits by and against them may be brought and maintained.(*a*)

(*a*) 1 California Statutes, 333.

CHAPTER VI.

MARRIAGE, HUSBAND AND WIFE, AND DIVORCE.

A CONTRACT of marriage may be entered into in this state between white persons, the male being over the age of twenty one, and the female over the age of eighteen years, and not of kin within the second degree.

Where the parties are under that age, they must have the consent of parent or guardian, or other person under whose care and government such minor may be. If the contract affects or creates a lien on real estate, it must be reduced to writing and signed by the parties, and acknowledged or proved as deeds are, and put upon record in the county where the parties reside, as well as in the county where any of the lands to be affected thereby are situated; and from the time of its being recorded the property is held by it. It may be altered and changed at any time before the contract has been celebrated, but not afterwards. After the celebration of the marriage contract, the contract in reference to property will govern, except where there is a provision in the contract making a different order of descent or inheritance, either with respect to themselves or amongst their children. Contracts, too, that derogate from the husband his rights by law as the head of the family, and his right to control the wife and children, or from the survivor of either as the guardian of children, are void and of no effect.

If the contract is entered into between minors, and the real estate is affected by it, the consent of the parent, guardian or other person having the control of such minor, must be given in writing. All contracts between persons within the second degree of kindred, and between a white person and negro or mulatto, are void, and if the contract is cele-

brated they are criminally liable, and may be prosecuted and punished by fine and imprisonment, or both, at the discretion of the jury or court that tries the case. The fine is to be not less than one hundred, nor more than ten thousand dollars; the imprisonment not less than three months nor more than ten years.

A judge or justice, clergyman or licensed preacher of the gospel, may perform the ceremony of marriage; but they are not to marry minors without the consent of their parent, guardian, or other person by whom the minor is governed or controlled. For a violation of the provision, they may be fined in a sum not exceeding one thousand dollars.

All marriages celebrated in other states or countries, are held valid and binding here, and their rights and duties are to be determined by the law of the state, except where governed by a contract of marriage valid and binding where celebrated.

HUSBAND, RIGHTS AND LIABILITIES.

The husband acquires no right to the property of his wife by marriage, except to the income, rents and profits of it, either of personal or real property. During the existence of the connection, the property acquired by the husband and wife after and during coverture, (except that acquired by gift, bequest, devise or descent,) including the income, rents and profits of the separate property of each, is the joint property of husband and wife.

The property owned by the husband before marriage is his separate property, and on the dissolution of the marriage contract by either death or divorce, the wife acquires no dower or interest in the same, but it passes to his descendants, subject to his debts and to the debts contracted during coverture, if there is not enough to pay them out of the common or joint fund. The joint property is liable to the common expenses of the family or community, and on the death or dissolution of the connection it is to be equally divided; a moiety or half to the survivor, the other to the descendants of the deceased, if any, if not, then the whole to the survi-

vor, subject to the payment of the debts of the decedent. The husband acquires no title by curtesy or otherwise in the property of the wife on her death.(*a*)

The husband acquires the right to control the separate property of the wife, including what she acquires after marriage, during coverture; but without the power of sale or other alienation. He is also entitled to the control of the joint common property, with absolute power and perfect right to sell and dispose of it without the consent or interference of the wife, except the homestead, with five thousand dollars if they have it, which cannot be disposed of without the wife's signature and consent to a deed, and her acknowledgment separate and apart from her husband.(*b*)

The husband is entitled to control his wife as the head of the family, and to superintend the affairs as guardian of his children; and, if over eighteen years old, he may make a will and by it dispose of his property, but not to affect his wife's property or her moiety of the common property.(*c*)

The husband has a right of action against any person who shall commit adultery or have criminal connexion with his wife. The amount of damages he is entitled to recover, will depend upon the circumstances, the extent of the injury, the standing and wealth of the parties.(*d*)

If an assault is committed on the wife, the husband, along with the wife, is entitled to an action for the assault committed. And where the injury is serious and attended with loss of time and heavy expenses, the husband is entitled to a separate action for the damages. This last action is founded upon the loss of the wife's services, and the money expended upon her recovery from the injury. If to protect the wife against an assault or injury from any person, he is required to wound or kill the person or persons about to inflict the injury, he is excused by the law.(*e*)

(*a*) 1 California Statutes, 254.
(*b*) 2 California Statutes, 296.
(*c*) 1 California Statutes, 254.
(*d*) 2 Black. Com. 140.
(*e*) 2 Black. Com. 3 and 4.

LIABILITY OF THE HUSBAND.

The husband is not liable for debts of the wife contracted before marriage, but after marriage he is liable to support the wife in a reasonable manner, considering their situation and circumstances.(*a*)

Where the wife, after living with the husband, is compelled, from bad conduct on the part of the husband, to abandon him and her home, the husband is liable for her reasonable expenses incident to her support; he is liable to those who give her credit, although against the special prohibition of the husband, and notice that he will not pay the debts so contracted. Where the husband sends his wife away, or they separate by mutual consent to live apart, although the wife may agree to support herself, still is the husband liable for her support, and the wife is authorized to procure the same on his credit.

Where, however, the wife abandons the husband without just cause, and lives apart from him, the husband is not liable for her support, or for debts contracted by her. But if the wife returns and offers to discharge her duties as wife, and the husband refuses to receive her, and during her absence from him she lived in a chaste and proper manner except as to her abandonment of him, he is liable for her support and maintenance after she makes the offer to live with him again. Where the wife elopes with her adulterer, the husband is not liable, and if she should return repentant and offer to live with him again, he is not liable for her support thereafter. The husband is jointly liable with the wife for the torts and frauds committed by the wife during coverture, but not for those committed before marriage; if committed in his presence, he alone is liable and the action must be against him alone; but where he was not present, the action must be against the two jointly. Where punishment is corporal for an act done by the wife, not coerced or advised to by the husband, she is to receive it, not the husband.(*b*)

(*a*) 1 California Statutes, 255. (*b*) 2 Kent's Com. 128, 131, 132.

RIGHTS OF THE WIFE, AND HER LIABILITIES.

The wife acquires no right to the separate property of the husband by virtue of the marriage, nor is she entitled to dower therein after his death. As the wife, she is entitled to a moiety or half of the property acquired by both, during coverture, except that acquired by gift, bequest, devise, or descent, including the profits or income of the separate property and labor of both. Upon the death or dissolution of the connection, the husband, or his descendants, take the other moiety; if there are no descendants, then she, as the survivor, is entitled to the whole, subject to the payment of the debts of the community, or those incurred during coverture.

She retains, as a matter of right, all her own property; but to do so she must make out a full and complete inventory of her property, and sign the same, and acknowledge or prove it by a subscribing witness before a judge, justice, clerk of a court of record, or notary public, and have the same recorded in the county where she resides, and in those counties where any of her real estate is situated.(*a*)

The husband is to manage and control her property, and, as a matter of right on his part, he is entitled to the rents and profits of it. He is also to control, in the same manner, the property she may acquire during coverture, by gift, bequest, devise, or descent. She cannot dispose of any of her property, except with the consent of her husband, and he joining her in the execution of the deed. A gift, by her to her husband, of the whole or part of the proceeds of the sale of any of her separate property, must be by written consent to that effect.

If the wife has just cause to apprehend that her husband has mismanaged or wasted, or will mismanage or waste her separate property, she, or any person on her behalf, may have a trustee appointed to take charge of the same; the appointment to be by the district court of the county where the parties reside, upon application to that effect. The trus-

(*a*) 1 California Statutes, 254.

tee is to give bond for the faithful discharge of the trust, and may be removed and another appointed by the court, where necessary for the protection of her interest. The trustee must give bond, with sufficient sureties, to the approval of the court. The trustee, in paying the rents and profits of her separate property to the husband and wife, is to be governed by the order and direction of the court.(*a*) She can sue and be sued alone where the action is in regard to her separate property. Where the action is between her and husband, where she is sued along with her husband, she can defend separately as to her own right and interest in the matter controverted.(*b*)

The husband is not liable for the debts of the wife contracted before marriage, but her seperate property is,(*c*) if she have any. A wife is entitled to remain in possession of the "homestead" of her husband with five thousand dollars, and unless they sell and dispose of it together, she signing and acknowledging the deed separate and apart from her husband, she does not part with that right. The "homestead" is not subject to the liabilities of the husband, except in favor of a mortgage prior to marriage,(*d*) or mechanics', or vendors' lien on the same property. The wife during coverture, may become a sole trader, and carry on a separate business from that of her husband. The capital and profits of the business, are exempt from the liabilities contracted after coveture, except the contracts of her own.

In becoming an independent trader, she can take from the husband to the extent of five thousand dollars. The balance of capital must come from some other source. The capital thus received from her husband, is exempt from liabilities of the husband. If, however, she takes or receives more than the five thousand dollars from him, she ceases to be a sole and independent trader, and the capital received from her husband, together with the profits of the business, will be liable to attachment and execution, as the property of her husband. To become such sole trader, she must make, be-

(*a*) 1 California Statutes, 254.
(*b*) 2 California Statutes, 52.
(*c*) 1 California Statutes, 254.
(*d*) 2 California Statutes, 296.
(*e*) 3 California Statutes, 101.

fore a notary public, judge, justice, or clerk of a court of record, a declaration in writing, that she intends carrying on business in her own name, and on her own account, setting forth the nature of the business, trade, profession, or art. After signing and acknowledging her declaration, and causing it to be certified by the officer, before whom she makes it, she will then place it with the recorder of the county, where she intends acting as sole trader, after which she is to have a copy of the declaration advertized in some newspaper published in the county. After this is done, she becomes a sole trader, and can act as such. Her liabilities as sole trader are the same as those of every other trader. She can sue and be sued, her property may be attached and her person arrested, as any other debtor. She is also liable for the maintenance of her own children, while sole trader.

She will be entitled to the benefit of the law exempting certain property from execution—to a homestead, if her own, and her husband have none; and to the redemption law and the bankrupt law.(*a*)

The wife may dispose of her property by will, if the husband consents thereto. And where, by a marriage contract entered into before marriage, she acquired the right to dispose of her separate, or separate and common property, during coverture, she can do so by will.(*b*)

DIVORCE.

Husband and wife may be divorced from bed and board, or bonds of matrimony, for natural impotence, existing at the time of marriage; where the female, at the time of marriage, was under the age of fourteen, and was without the consent of parent, guardian, or other person having the legal care and custody of her person, and not ratified after she shall arrive at such age; where either party has been guilty of adultery, (but if known to the other, and after so known, they have cohabited together as man and wife, it ceases to be a cause for divorce,) and where the act of adultery was done by collusion of the other party, that will destroy the cause.

(*a*) 3 California Statutes, 101. (*b*) 1 California Statutes, 177.

The application must be by the innocent party, not the guilty one.

For extreme cruelty in either party; for habitual intemperance; wilful and continued desertion, by either party, for the period of two years.(a)

For wilful neglect of the husband for the period of three years, he having the ability to provide the common necessaries of life.

Where the consent of either party was obtained by force or fraud, upon the application of the injured and innocent party; where either party has been convicted for felony, and punishment is not less than imprisonment for two years.

These are the causes for which a divorce from bed and board, or from the connection as man and wife, can be obtained. If from bed and board only, the parties cannot marry again; but if from the marriage connection, they can.

Where the husband is a citizen of the state, has deserted and abandoned his wife, and left no property or means to support her, she, having no means of her own to do it with, is in truth in a sad condition, and if her contracts were not valid, and if she could neither sue nor be sued in her own name, she would, in many instances, suffer for the means to live; but now, by the law authorizing married women to be sole traders, and subject to all the rights and duties of debtor and creditor, she is put into a condition to do something to gain a living; and so soon as the stated time passes, she can be freed from her husband, by a divorce from bed and board, or from the connection altogether.

The applicant must be a resident of the state six months immediately preceding the application. Where the application is founded on material impotency at the time of marriage, it must be made within two years thereafter, or it will be barred; and if so made, it must be by the injured party. Where the cause for a divorce granted is adultery of the wife, the legitimacy of the children born before the act of adultery complained of, is not to be affected by it.

The court, during the pendency of the action for divorce,

(a) Laws of 1853, p. 70.

or at the final hearing thereof, may provide for the support of the wife, and support and education of the children of the marriage, as shall seem right and proper; and at any time may vary or modify such provision as the interest of the parties may require, the court having full discretion and power in the matter.

The admission or statements of either party, or default of the defendant, is not sufficient to ground the judgment of divorce upon. The applicant is to prove the facts alleged as cause for the divorce. In doing it, the testimony of the parties, or either of them, is not admissible. The district court of the district where the applicant resides has exclusive jurisdiction in the action.(*a*)

In treating of divorce, I have but given what I think a true construction of the statute on the subject. There is no subject upon which there are greater variety of opinions than upon this. In some countries, it is held that a marriage in a foreign country is subject to the *lex loci contractus*, and if by that law the marriage cannot be dissolved, it cannot in any other, giving due regard to the rights of the parties.

In some countries the contract is looked upon as of a divine nature, and cannot be dissolved except by the act of God. In some other countries the law is as I have given it. But in all the rights to property which either party acquires by a marriage contract, if valid where made, will attach to and be valid in whatever country the property is carried to, or is situated.

In looking at the nature of the marriage contract, it cannot be claimed for it that its performance is implied to be where entered into or celebrated; but the true implication is, that its performance is to be in the future, and wherever the parties may happen to be, or in whatever country they may take up their residence; in that view the *lex loci contractus*, or place where it was celebrated, cannot apply. Our state considers the contract of a civil nature, and subject to a dissolution by her law, where parties come within her jurisdiction and the cause is sufficient to do it.

(*a*) 2 California Statutes, 186.

CHAPTER VII.

PARENT, CHILD, MINOR, GUARDIAN AND WARD.

I SHALL not treat of the natural, moral, and social rights and obligations of the relation of parent and child, but only to the extent that our law enforces them.

The father is entitled to the control and custody of his child until it arrives at the age of majority, which is fixed at twenty-one years.(*a*) The parent is entitled to the labor and services of his child during his or her minority, and to the guardianship in case the child shall be possessed of any property; and until a guardian is appointed, he is entitled to the control of his child's property, as the natural guardian.(*b*) If the father dies, and the mother is living and unmarried, she is entitled to the guardianship. If the father dies or abandons his children, and their mother is living, she is entitled to the custody, control and tuition of the child, and to the right of recovery for injury to or death of the child.(*c*)

The power and authority of the ruling parent over the child allows him or her to inflict reasonable punishment, to compel obedience to the lawful commands of such parent; and such power may be delegated to another, such as tutor or schoolmaster. Where the child is injured, and whether it occasions pecuniary loss or not to the parent, for the want of the services of the child, the parent having control of such child can maintain an action and recover damages against the person who caused the injury—whether the services of the child were of such character that to the parent they were valuable, as labor, or not.

A person who shall seduce a daughter, is liable for seduction to the parent; or one who shall assault a child is liable

(*a*) 3 Black. Com. 140; 2 Kent. Com. 208.
(*b*) 1 California Statutes, 268.
(*c*) 2 Cal. Stat. 52.

to the parent for the injury, and in either case, if the assault be aggravated, smart money may be recovered.(a)

LIABILITIES.

The parent is liable for the support and maintenance of his or her child, and the law enforces support from the parent when the child is diseased in its infancy, or by an accident is unable to work.(b) But if the child is able to work and make its own support and maintenance, the parent is not bound to give it. The kind of maintenance, is the use of the necessaries of life, healthy food and clothing; anything beyond that is to come from the parent at the promptings of those feelings that nature has not failed to plant in the bosom of every parent. The grand-parent is equally liable as the parent to give maintenance to their grand-child, if the parent is dead or unable to do so.

The courts of our state will enforce this legal obligation by application on the part of the child, and a guardian will be appointed by the court to prosecute the action, which is to proceed as other cases. The parent is to give the child protection; and connected with this is the right to defend them against all harm or danger; to shelter them by house or dwelling; to uphold them in suits on their behalf; and he may justify an assault and battery committed in their defence.(c) The liability of the parent to educate the child is not enforced by any law on the subject, but left to the discretion of the parent.

If, however, the child is permitted to go to school, the law will imply a promise to pay for such schooling and expenses incident to it, on the part of the parent;(d) and where the child has property, independent of the parent, the guardian of such child, whether the parent or not, will be bound to give the child a suitable education, and the court having control of the actions of such guardian has power to compel the guardian to do it.(e)

(a) 2 Kent. Com. 208; 3 Black. Com. 140.
(b) 2 Kent. Com. 180; 1 Black. Com. 446, 8.
(c) 2 Black. Com. 3, 4.
(d) 2 Kent. Com. 187.
(e) 1 Cal. Stat. 268, 269.

DUTY AND OBLIGATION OF CHILDREN.

The duty of children to their parents is obedience to their lawful commands. Their legal obligations extend to their support, when, on account of poverty, old age, disease, or other infirmities, they are unable to maintain and support themselves. This applies between grand-children and grand-parents, as well as children and parents, even where the parent fails in his duties to his children, in giving a trade or profession, or has induced them to prostitute their bodies, and occasioned them a loss of reputation; still they are legally liable to render support and maintenance to their wicked and unnatural progenitor, if they are able to do it.(*a*)

ILLEGITIMATE CHILDREN.

The duty and obligation of such a child only extend to the mother. The child, however, if acknowledged by its father in writing and witnessed by one competent, can inherit as heir to the father, but cannot represent him either lineally or collaterally. The child is heir to his mother to the same extent, whether acknowledged by its father or not. If, after the child is begotten, the father and mother intermarry, that cures the defect, and renders the child heir as perfectly as if born in wedlock.(*b*) Children that are born to parents whose marriage is null in law or dissolved by divorce, are legitimate; but those born forty weeks and eleven days after the marriage has been dissolved by divorce or the death of the husband, are illegitimate.(*c*) The mother is entitled to the custody of the child, and not the putative father; but he is liable for the support of it, as parents of other children.(*d*)

This law gives no reward to the mother as against the father of the unfortunate offspring of their illicit connection, but merely compels the father to support the child, to prevent it from becoming a public charge. The proceeding is

(*a*) 1 Black. Com. 374, 454; 2 Kent. Com. 213.
(*b*) 1 California Statutes, 220.
(*c*) 1 Black. Com. 457.
(*d*) 1 Black. Com. 458.

to be on behalf of the child, for whom the justice is to appoint a guardian to prosecute the suit. The mother may be compelled to testify in the matter at any time after thirty days from the birth of the child; and if the mother fails to act for the child and compel the putative father to give support and maintenance, any person, as its next friend, can do so, and have a guardian appointed for it.(a)

GUARDIAN, MINORS AND WARDS.

The father, and upon his death the mother, are the natural guardians of their children, and entitled to their control and custody. If any of their children have property in their own right, the court has the power to appoint a guardian for such children, to take the control and management of such property. The father, if living and suitable; if he is dead, then the mother, if living and not married and suitable, have preference over all others to be such guardian; and it is the duty of the court to make such appointment on their giving the required bond. In case the children have property in their own right, and no guardian be appointed, from neglect or inadvertance, the father, and upon his death the mother, is entitled to the custody and control of such property; if real property, he or she has the right to rent and receive the rents; if money, he or she has the right to put it out on interest and collect the interest; and on the appointment of a guardian, or the children arriving of age, the parent who received the property must settle with the guardian or child, by paying or surrendering the property, money, interest or profits to the child or guardian, as the case may be.

Where a guardian has been appointed other than the father and mother, and one or the other, or both of the parents are living, there the guardian has but the control of the property of the child, while the parent or parents have that of the person. Where the child has no parents, there the guardian has control of the person and property of the

(a) 1 Black. Com. 458; 2 California Statutes, 52.

minor, and in regard to control, it is the same as that of a parent, and his liability for necessaries extends as far only as the property of the minor. The father, by will, may appoint a guardian for his children, and after bond given by him, he can act as guardian. The will may limit the time of guardianship to any time less than the majority of the minor, and the provision may be in regard to one born or expected.(*a*)

MINORS.

All persons under the age of twenty years are minors.

At the age of fourteen, they may select their guardians, except where the father or mother is living, and entitled to be appointed, or a guardian is appointed for them by will of the father. The person selected, if approved of by the court, will be appointed; but if not approved, the minor is to be cited by the court to nominate a suitable one within ten days, and if none is nominated in that time, such as the court will approve. At the age of eighteen years, females may marry; and before that time with consent of parent, guardian, or other person having the legal control of such minor. Upon marriage, they are able to contract, as *feme coverts*. At the age of twenty-one years, males may marry; and sooner with the consent of parent, guardian, or other person having the legal control of such minor; and on marrying, he can act free of his parent, guardian, or other person having legal control of him. At eighteen, either male or female, whether married or single, may dispose of their property by will, if of sound mind; but if the female is married, then the will is to be made with the husband's consent. The guardian, after nomination, is to give bond to the minor in such sum and such sufficient sureties as the court shall direct and approve; and he is thereupon to make a true inventory of all the real and personal property of his ward that shall come to his possession or knowledge, by the appraisement of three disinterested men appointed by the court for that purpose, under their oath, and return the same to

(*a*) 1 California Statutes, 268.

the court, in such time as the court shall direct; and within one year, and as often thereafter as the court shall direct, he is to render, under oath, an account of his transactions with the estate of his ward, and at the end of his trust to settle and liquidate the same with his ward, or his legal representatives. Where a minor has no guardian, and a suit is necessary to be brought, either for or against him, before a court of record of this state, the court is to appoint a guardian for such minor, to prosecute or defend the suit. If the father or mother of such minor is living, (except where the mother is married to a person other than the father,) and are suitable persons for such purpose, they are entitled to such appointment in preference to any other. Where the minor has a guardian and is possessed of property, and his parent is living, and the income of the minor's property is sufficient for the minor's maintenance and education in a manner more expensive than his parent will afford, such expenses may be directed to be incurred and paid by the guardian out of the income of the minor's property.(*a*)

There are other persons for whom a guardian is to be appointed beside minors. Such as are insane or mentally incompetent, from old age or other cause, from managing their property; a guardian is to be appointed for such persons by the probate court.(*b*)

Where any person, on their behalf, shall make complaint to the probate court that such person is insane, or mentally incompetent to manage his property, stating the reason why he is so incompetent, the court is to cause a notice to be given to the person supposed insane or incompetent, that the matter will be by him tried before that court, stating the time and place—the notice to be served on such person at least five days before the time appointed for trial. After a full hearing and examination of the case, if the person is insane or incompetent, the court is so to decide, and appoint a guardian either over his property, with power to manage his estate, or over his person and property, with power to manage and control both. The guardian is to give

(*a*) 1 California Statutes, 268. (*b*) 1 California Statutes, 268.

bond, and his rights and powers are the same as guardians over minors.(a)

The guardian is to collect all debts due his ward, and pay all due from him, defray his reasonable expenses for maintenance and education, or the maintenance of himself and family, if he have one; and in case the income of his property is not sufficient, then he is to sell enough of it, whether real or personal, to do so.

The court is to require the guardian to manage the estate of the ward frugally without waste, applying the income to the necessary expenses and liabilities of the ward and his family, if he have any. If the income is sufficient to do it, then the property or capital, as the case may be, is not to be sold or disposed of; but if that cannot be done without, then so much of the estate as will be necessary to pay the liabilities, and defray the necessary expenses of the ward, is to be sold, and the proceeds applied to that purpose under the orders of the court. Where the property is of such a nature that it cannot be sold in such parcels as will produce the required sum of money and no more, then the court is to order the sale of the smallest quantity of property, and the proceeds not required to pay off the liabilities and defray the expenses of the ward, the guardian is to put out or invest to the best advantage, until it shall be required for the payment of the liabilities of the ward.

Where a ward has real property, and it would be best to change it from real to personal productive property, the court may order the sale of the real property by the guardian, who is to invest the proceeds in the best manner for the ward, or as the court may direct. The law provides, that all sales of real estate of minor heirs, made for the benefit of said minor heirs, shall be for cash, or for part cash and part deferred payments, not to exceed three years, bearing date from date of sale, as in the discretion of the probate judge may be most beneficial to said minor heirs. Guardians making the sales are required to demand and receive from the purchasers bond and mortgage on the real estate

(a) 1 California Statutes, 268.

so sold, with such additional security as the judge may deem necessary and sufficient to secure the faithful payment of the deferred payments, and the interest thereon.(a)

All sales of personal or real property by guardians must be by order of the probate court, made upon petition by the guardian. The sale is to be by public auction, and in pursuance of the order and direction of the court. The notice of the time and place of the sale of personal property is to be given ten days before the sale, and given in such manner as the court may direct. The sale of real estate is to be advertised in a newspaper printed in the county, where such estate is situated, for three weeks next preceding the sale; and in addition thereto, written notices are to be posted up in three public places in the county. If there should not be any paper published in the county, then the court is to order the paper the notice is to be published in.

Before the court is authorized to order the sale of any part of a ward's real property, whether minor, insane, or incompetent, it is to order the next of kin of the ward, and all others interested in the property, to appear before it, in not less than four nor more than eight weeks from the time of the entry of such order—a copy of which is to be served on the parties at least fourteen days before the hearing of the petition, or published three successive weeks in some newspaper in the county before such hearing, if any paper is published in the county; if none, then in such paper as the court may specify in such order. At the time and place named in the order, or any other time to which the hearing may be adjourned to, the court is to proceed to the examination of the matter of the petition, by requiring the proof of service or publication of the order, and to hear any testimony of the petitioner, the next of kin, or any person interested in the estate.

If the court is of opinion that the property should be sold, the order is to state the purpose for which the sale is made —whether to raise money for maintenance, education, or to be invested again—and whether the sale is for cash down,

(a) Laws of 1853, p. 129.

or a credit of six months, and direct the manner of giving notice, if no paper is published in the county. The guardian, before the sale, is to enter into a new bond in such sum and with such sureties as shall be approved of by the court, with condition to sell the real property and account for the proceeds, according to law. The notice of the time and place of sale is to be given as directed, and the property is to be described in the notice with common certainty. The sale is to be in the county where the property is situated, and between the hours of nine o'clock, A.M., and before the setting of the sun on the same day. If the sale is made on credit, the guardian is to take a note and mortgage on the property sold, for the payment of the purchase money.

The guardian is to report the sale at the next term of the court, after such sale was made; any person interested in the estate may file written objections to the confirmation of the sale, may introduce witnesses, and be heard in support of his objections. The court is to examine the same, and if the sale was fair, he is to confirm it; if unfair, and the price is not equal to the value of the property, and, by another sale, ten per cent. over and above the bid and expenses can be obtained, the sale is to be vacated, and another order must be made, which the guardian is to conduct in all respects as if no previous sale had taken place.

If, after a sale is reported, and all objections, if any, are heard, the court shall think the sale was fairly made and legally conducted, and that a greater sum could not be obtained, the court is to confirm the sale and direct the conveyance to be made to the purchaser, and to have it entered on the minutes of the court, and from that time the sale is valid.

In accordance with the order of the court, the guardian is to convey the property by a deed which is to recite the order of sale, the order confirming it, and to direct the conveyance; and such conveyance operates to convey all the right and title to such property. The court, in the examination of the sale, is to require proof of the notice thereof, and, in the order of confirmation, it is to be so recited.

The guardian can adjourn the sale, from day to day, by

publicly declaring it at the time and place first appointed for the sale; but if it is adjourned for a longer period than one day, notice thereof is to be given by publishing or posting notices thereof, as time and circumstances will admit of. The court has power to direct the investment and disposition of the money and effects of the ward, from time to time, as the case may require. The court has power to require that guardians renew their bonds, or give additional ones; and it may discharge a guardian for incapacity, and appoint another; or, when no longer necessary, may discharge him of him trust, and the ward, or the ward and estate, from his control.

The marriage of the ward terminates the guardianship. Where a non-resident minor has property in the state, any friend, or other person interested in the estate, may apply to the probate court of the county where the property is situated. The court is to order notice given to all persons interested, in such manner as the court shall deem right and proper; and, after such has been given, as directed by the court, a guardian may be appointed for such absent person. If the person shall arrive within the state thereafter, he is to be subject to the control and custody of his guardian. The guardian of such non-resident is to give bond, after which, his rights and duties are as other guardians, and will extend to all property of his ward within the state.

If there should be two guardians appointed for a non-resident minor, having property in different countries, the one first appointed is valid, the other void.

The court may appoint more than one guardian for a minor, or insane person, or one incompetent, at the same time. Guardians are entitled to their reasonable expenses incurred in the execution of their trust, and compensation for services, which the court is to determine.(*a*)

A guardian of the person of his ward has the right to protect him as fully as the parent, and may bring suit for his injury or death, and that, too, whether the injury has occasioned loss to the guardian or not; and he has the right

(*a*) 2 California Statutes, 52.

to consent to and superintend the separation or partition of his ward's personal or real estate, held in common or jointly with another.

WARD.

The relation between the guardian and ward is that of trustee and *cestui que trust*, so far as the management of the ward's property is concerned; and, in regard to his person, the duty of a ward to his guardian is the same, in every respect, as that of the parent. The authority of the parent is withdrawn, and in its stead, the law places that of the guardian.

There are two periods within which a ward may bring suit on the bond of the guardian, in his favor: where the ward is under no disability, within three years after the guardian has been discharged from his trust; where the ward was under a disability at the end of three years from the discharge, then within three years from the removal of such disability. A contract with the ward by the guardian, during the minority of the ward, is void. So, too, is one after the trust expires, if made before settlement of the accounts and transfer of the possession of the estate to the ward, or the control or influence over the mind of the ward, in favor of the guardian. But if all accounts are settled, money and property of the ward delivered and paid him, no further influence exerted by the guardian over him, and the ward, in thought and action, independent, then a contract would be valid.

The money and property of the ward, in the hands of the guardian, must be used for the ward's advantage. If, without the direction of the court, it should be used in trade, the profits must enure for the ward's benefit.(*a*)

WIDOW AND CHILDREN.

A widow having children is entitled to their custody and control until they arrive at the age of majority. She stands

(*a*) 2 Kent. Com. 237; Story's Equity, 313.

at the head of the family in place of the father, is their natural guardian, and, until one is appointed, is entitled to the custody and control of her children's property; and, in case of injury to her children, either by assault, death, or otherwise, she has the right of recovery on account thereof.(a) If her child or children have property, she is entitled to be their guardian on giving the bond required by the probate court. She has the right to administer upon her husband's estate; and if named as executrix in her husband's will, is entitled to act as such. She is entitled to one half the homestead, and the children to the other. If in an incorporated town or city, she is entitled to a house and lot worth not over five thousand dollars, to be by her selected; if not living in an incorporated town or city, then twenty acres of land, with the dwelling-house situated thereon, together with the personal property exempt from execution, if the husband had that amount at his death. At the death of the husband, the widow, for herself and children, is entitled to a reasonable support, until the administration of the estate; the allowance to be made by the probate court. If the deceased did not have the amount of property exempt from execution, then the court, on the coming in of the inventory, is to make a further allowance to the widow for herself and children, for their maintenance during the progress of the settlement of the estate, which is not, in an insolvent estate, to be longer than one year. Where the estate of the husband is inventoried, and, by the inventory, does not amount to more than five hundred dollars, then the whole estate belongs to the widow and children, subject to the payment of the funeral charges, and expenses of the administration; and, in that event, the court, by a decree, is to assign the same to her; which settles the estate. Where, however, the widow has, in her own right, an income from her separate property, equal to the allowance to be made her and her children, then the whole is to go to the children. Where the estate of the husband after settlement proves to be more, the balance is to be divided between the

(a) 2 California Statutes, 52.

widow and children, a moity to the widow and the other to the children. Where the children are the husband's by another woman, the rule is the same. Where the husband left no children or grandchildren entitled, from him and his estate, to support, the widow alone is entitled to the provision for maintenance, the property exempt from execution, the homestead, and amount of the balance of estate, after payment of debts and expenses of settling the same, except the individual property of the husband, owned by him before marriage.

A widow that shall marry, loses the right to administer upon her husband's estate; or, having administered, her powers as such, from the time of the second marriage, ceases; also, her right to the guardianship of her children having property, but not to their control, tuition, and protection, and the rights to bring suit for any injury to them, while minors.

If, on the death of a father, he should have no widow, but have children, then the children are entitled to the provision for maintenance, the property exempt from execution, the homestead, and residue, after payment of debts and expenses of settling the same.(*a*)

WIDOWER.

The only right which the husband has, upon the death of his wife, is to administer upon her estate, if she have any, and not disposed of by will, and another named as executor.(*b*)

(*a*) 1 Cal. Stat., 219; 2 Cal. Stat., 448; 2 Cal. Stat., 462, 463, 296.
(*b*) 2 California Statutes, 454.

CHAPTER VIII.

THE RIGHTS OF PERSONS TO PROPERTY.

The rights that persons have in California are fixed, defined, and guarded by the law.

The rights of persons are to either real or personal property, and those annexed to, or attached to their persons, as citizens of the United States, the state, and the community in which they reside.

The most usual way of acquiring title to personal property is by purchase. This supposes title in the seller.

In all contracts not to be executed within one year, the same must be reduced to writing, and signed by the party bound thereby. All sales of personal property to be delivered after one year, are not binding on the parties unless it is reduced to writing, the consideration named in it, and signed by the parties. And all contracts of sales of property, the prices of which are two hundred dollars or over, are not valid, unless the buyer pays the whole or part of the price, or receives part of the property, or the seller signs a memorandum of the contract at the time of making the purchase. Where, however, property is sold by an auctioneer, the sale is valid, and the contract binds all parties, if the auctioneer enters at the time of sale, in his sale book, a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made.

Where a person who has the possession or control of personal property, sells, assigns, or mortgages the same, he must transfer the possession of the property to the buyer, assignee, or mortgagee, and such person must remain in the possession, and not return it, or else the sale, assignment, or

mortgage is not good as against the creditors of the seller, asssignor, mortgagor, or subsequent purchasers in good faith; but it is good as against the seller, assignor, or mortgagor. The conditions named above are those which are such while the property shall remain in the possession of the seller, assignor, or mortgagor. Thus it will be seen, that a person making a purchase of personal property, must take the same into his possession or under his control, to avoid the risk of having it taken by the creditors of the seller, or by a subsequent purchaser in good faith. In taking possession or control of personal property, it must be done in such a manner as to give to the buyer the actual possession or control of the property. *Change of possession or control, is what the law requires.*

A change of possession is effected where the dominion and control of the property is taken by the buyer away from the seller, as fully aud perfectly as the article of property will admit of at the time.

Where the seller delivers the property sold to the buyer on credit or for cash, or property paid, the transaction is closed, and the title and possession passed to the buyer at one and the same time. Where the contract of sale is made, and the property is in existence, and the seller has nothing more to do to the same, here is a good and binding contract between the seller and buyer. The title and risk of the property is in the buyer after the contract is completed, and the right to the purchase money is in the seller.

The buyer cannot take or sue for the possession of the property, without paying or tendering the contract price. The seller cannot sue for the price without tendering delivery. Where the contract is silent as to the time of delivery, and the sale is on credit to the buyer, the title to the goods and right to their possession vests at once in the buyer, and passes out of the seller on the conclusion of the contract. The price or consideration of the sale is a condition precedent, and must take place before the seller is bound to part with the possession of the property. The seller has a lien on the property for the price thereof, until it is paid, or is by him waived. If the sale is for money, the payment is to

be made—if by note, on time, the execution and delivery of the note; if in other property, the delivery of it upon a simple credit against the buyer, charged in the books of the seller. Any of these ways if according to the contract, is paying for the property, and when done, the title to the same changes, as well as the right to the possession. Where, however, a sale is made on credit to the buyer, and while the property is travelling to the buyer,—on its way, not as yet delivered to him, or his agent appointed to receive the same—the buyer becomes insolvent or bankrupt, the seller has a right to overtake the property, and stop it from reaching the buyer, and then his lien for the price attaches; and until he receives payment in money, he is not bound to deliver the property to the buyer or his representative.(*a*)

If delivery takes place at the making of the bargain, it is then an executed contract. Where the delivery of the property to the buyer is to be done at a future period, the condition or consideration that induces the seller to agree to part with the property, is to take place or happen according to the contract. To impose the obligation upon the seller to deliver it, the usual condition is, the payment of the price. Where, however, property is sold, and payment of the price and time of delivery is in the contract, the law implies that it was understood that payment of the price was to be made before the seller was to part with the possession of his property; and until the price is paid, or tender made of it, the seller is not under obligation to deliver the same to the buyer.

It must not be forgotten, that if the property is left in the seller's posssession, the performance of the contract will rest alone upon his responsibility. If the goods, before they are delivered or put out of the control of the seller, are levied on, or attached as the seller's in favor of a creditor, or shall be sold to another buyer in good faith, the buyer has but his right of action against the seller for breach of contract.(*b*)

And in case the buyer shall pay the whole or part of the

(*a*) 2 California Statutes, 266, 267. (*b*) 2 California Statutes, 267.

price or consideration for the property, and the seller retains the possession of the same, so long as it continues in his possession, his creditors may attach or levy on it, or the seller may sell them again to any person who shall buy in good faith. In either case, the buyer will have but his action, with the responsibility of his seller, to indemnify him on account of his money or property paid, and damages for breach of contract. In making a contract for the sale of personal property, where the delivery does not take place within a year, there the contract must be in writing, and the consideration named, and signed by the parties bound thereby; but if the delivery is to be within the year, and the price of the property is not two hundred dollars or more, the contract is valid and binding if made verbally, provided the parties are capable of making a contract.

But if the price of the property is two hundred dollars or over, no matter when the property is deliverable, the contract to be binding must be reduced to writing, the consideration named in it, and signed by the parties bound thereby, or the seller must receive part of the property purchased, or pay part of the consideration money to the seller. Either of these two last things being done is tantamount to reducing the contract to writing, signed by the parties bound. It must be remembered that where the property, by the contract, is not to be delivered within one year, there nothing will dispense with the necessity of reducing it to writing, naming the consideration.(*a*)

Where the delivery is within a year, and the price of the property sold is not two hundred dollars, there the contract is good and binding, if a verbal one; but if the delivery is within a year, and the price of the property is two hundred dollars or over, it must be reduced to writing, as stated, and signed by the parties bound, or part of the property received by the buyer, or part of the price or consideration paid to the seller.(*b*)

(*a*) 1 California Statutes, 267, 268. (*b*) 1 California Statutes, 267, 268.

WARRANTY.

All contracts for the sale of personal property in the possession of the seller includes an implied warranty on the part of the seller, as to the title; and in case it fails, the buyer has his action against him for the price paid, and damages for breach of the contract. Where, however, the property is not in the seller's possession, the warranty does not apply—the purchaser buys at his risk. But if the seller shall affirm and declare that the property is his, and it shall appear that the buyer relies upon it, then the seller is bound as a warrantor of the title. Where the property is in the possession of the seller, the warranty applies whether any affirmation, in reference to the title, was made by him or not; but if he sells the property as agent for another, and he makes known the agency to the buyer, the rule is different: there the buyer is bound to examine into the title, and if he buys with or without such examination, he does so at his risk. If the title proves defective, in a sale where warranty is implied, the buyer has his remedy for satisfaction from the seller.(*a*)

With regard to the quality of the property, unless there is an express warranty on the part of the seller, none will be implied. The seller is, however, liable for deceit, if he misrepresent the quality of the property to the buyer, and the buyer cannot make an examination of it, and relies upon these representations at the time the bargain is made; or where the buyer relies on these representations, and suspends the examination of the property: in all such cases, the seller is liable for his deceitful act in selling his property.(*b*)

And where the seller conceals some defect in the property he sells from the knowledge or observation of the buyer, there the seller is also liable for deceit.(*c*)

Where, however, the buyer has full and fair view of the property, and by exercising his faculties of observation and judgment he can discover the defects in the property, or

(*a*) 2 Kent. Com. 608.
(*b*) 2 Kent. Com. 608; 2 Black. Com. 466.
(*c*) 2 Kent. Com. 608; 2 Black. Com. 466.

ascertain for himself the quality and character of the same, the deceit cannot apply to the seller, and no liability attaches to him. Even if he should put down in a memorandum of sale, in writing, a different description of the property and its quality, he is not liable for deceit, nor does the law imply a warranty. The law infers that the purchaser relies on his own observation and judgment, as to the property, its quality and price, or he would not have made the purchase after such view and inspection.(a)

But there is a numerous class of cases where an implied warranty will attach to the seller. When the purchaser buys a certain kind of property, and it is not convenient or customary for such property to be inspected before it is bought, the seller must deliver property in character and quality to answer the description. There is another class of cases subject to the same rule—to wit, sales of property by sample; the whole must, in character and quality, come up to, and be equal to the sample.

There are large amounts of property in the commercial world sold and bought without any inspection, or an offer on the part of the seller that the buyer shall inspect the same, and where an inspection is not customary; and in many cases it could not be done without loss of much time, and subjecting the buyer to a heavy expense. There are sales of certain denominations of property with many different qualities, each quality having a different value from the others.

In these cases an implied warranty attaches to the seller, that he delivers the kind and quality of the article sold. If he sells mess pork, it will not answer for him to deliver rusted mess pork, for that was not the quality of the article sold. Mess pork, in the market, means a good and sound article; in other words, a marketable article. Nor will it do for him to deliver prime pork, for that was not the kind of pork sold. One differs in the quality, and the other in the kind. The buyer is not bound to take anything but that which he purchased; and that which was sold, the seller is bound to deliver.

(a) 2 Black. Com. 451.

So, too, in the sale of flour. If the seller makes sale of one hundred bbls. sup. fine flour, it will not do for him to deliver sour superfine flour; nor will it answer to deliver fine flour to fill his contract. The one does not answer the description as to kind, and the other as to quality. The buyer is entitled to the kind and quality of the article he purchased, and the seller is under obligation to deliver it.

In case the property, after delivery and examination, proves not to be the article purchased in kind or quality, the purchaser may return the same to the seller, and rescind the contract; or he may make return of the property, and waive the *time* of delivery, and hold the seller for the delivery of the contract, or damages for the breach or failure thereof, and for the price or part thereof, if it has been paid. The return of the property must be within a reasonable time, and what that is will depend upon the circumstances of the transaction.

GIFT.

Title to personal property may be acquired by gift; that is, a transfer of the ownership of personal property by the owner to another. The title passes with the possession, and not before.

The difference between a gift and purchase is, that some consideration is necessary in a purchase, and the purchaser acquires title to the property so soon as the contract or bargain is made, and the seller has nothing further to do with the property sold; but in a gift, it is done without legal consideration, and the evidence of it is the change of possession and dominion. A promise to make a gift is not binding, for the want of legal consideration. A person cannot make a gift of his property, if he is indebted at the time. The gift is void, as against creditors at the time of the gift. He must be just before he can be liberal. A creditor has a lien on his debtor's property to the extent of his debt, which the law will enforce.

TITLE BY ADMINISTRATION.

An administrator of a decedent acquires title to his personal property, and if withheld from his possession, and against his consent, he has a right to bring suit for possession.

TITLE BY WILL.

Title to personal property may be acquired by will. If a testator shall will personal property to a legatee, so soon as probate is made of the will, the title vests in the legatee. The representative of the testator is under obligation to deliver the property according to the directions of the will; and if not delivered, suit may be maintained for it.

TITLE BY MARRIAGE.

Title may be acquired, by marriage, to personal property; but, according to the law, it does not attach to, and vest in the party, until the connection has been dissolved, either by the separation of the parties from bed and board, or the marriage contract dissolved by divorce, or ended by death.

On the dissolution of the marriage contract by the law, the parties are entitled each to a moiety of the property, subject to the payment of the debts of the decedent.

The accumulation of property after marriage, from the avails of the separate property of both, and the joint labors of both, (except the wife becomes trader on her own account,) will form the property for dividend, subject to the payment of the debts of the decedent. In case the connection is dissolved by the death of either party, then the survivor is entitled to a moiety, and the descendants of the decedent are entitled to the other moiety. If there are no descendants of the decedent, then the whole is to go to the survivor.(a)

HOW LANDS MAY BE ACQUIRED.

The government of the United States has the right to the

(a) 1 California Statutes, 254.

possession and property of the public lands within the state; but persons may take possession of not more than one hundred and sixty acres thereof, unoccupied and not containing mines of any of the precious metals, and hold the same, as against all others.(*a*) But the right of such person is subject to the title of the United States. After survey made of the public lands in our state, any citizen of the United States, or one who has declared his intention to become such, and who is a widower, or at the head of a family, or a single man over the age of twenty-one years, may acquire the pre-emption right to purchase any of the public lands unoccupied, not over one hundred and sixty acres, and not mineral lands, or reserved by any treaty, law, or proclamation of the president of the United States, and not included within the limits of an incorporated town, or selected for the site of a city or town, or settled and occupied for trade at the minimum price of one dollar and twenty-five cents per acre. To perfect such pre-emption right, the person must take possession, improve the same, and erect a dwelling thereon, and inhabit it. This will entitle such person to the right, if he is not the proprietor of three hundred and twenty acres of land in any state or territory of the United States; or shall quit or abandon his own land in our state, to reside on the public lands. Upon the pre-emption right being perfected, the title is to be purchased by an entry in the register's office of the district in which such land may lie.(*b*)

When the pre-emption right has been perfected, and the pre-emptor shall die before the title has been purchased, the executor or heir may make the purchase for the benefit of the heirs of such pre-emptor.(*c*)

The same character of persons may settle and improve, as stated, any number of acres of the unoccupied public lands, in this state, not exceeding three hundred and twenty acres, for the purpose of a town, and acquire the title thereto, in the same manner, and at the same price.(*d*)

(*a*) 3 California Statutes, 158.
(*b*) 5 U. S. Stat. 455, 456; 9 U. S. Stat. 521, 633.
(*c*) 5 U. S. Stat. 620.
(*d*) 5 U. S. Stat. 657.

TITLE BY PURCHASE.

Real property, in California, can be acquired by contract of purchase from the owner, if able to contract and part with the title thereto.(a) Persons able to part with their real property by contract, must be twenty-one years of age—not idiots, insane, drunk, or under restraint. All contracts of idiots, insane persons, drunkards, or persons under restraint, are voidable.

The contract, to be valid, must be founded upon a valuable consideration, and not tainted with fraud.

THE MANNER OF TRANSFORMING LANDS.

Lands, or any interest or estate therein, is transformed by deed, signed by the person from whom it is purchased or intended to pass from, or by his or her attorney duly authorized. The husband must join with the wife in a deed to pass her estate.

The deed must, to be valid, be acknowledged or proved; and, if executed in this state, must be before a judge or clerk of a court having a seal, or some notary public, or justice of the peace of the proper county; if acknowledged or proved without the state, and in the United States, then by some judge or clerk of any court of the United States, or of any state or territory having a seal, or by any commissioner appointed by the government of this state for that purpose; and if acknowleged or proved without the United States, then by some judge or clerk of any court of any state, kingdom, or empire, having a seal, or by any notary public therein, or by any minister, commissioner, or consul of the United States, appointed to reside therein.

If the proof or acknowledgment of a deed is taken before a judge or clerk, then it is to be certified by the hand of such judge or clerk, and seal of the court prefixed thereto; and if taken before an officer having a seal of office, then the certificate is to be under his hand and seal of office.

(a) 2 Black. Com. 291, 292.

The person who makes the acknowledgment must be known to the officer taking the same to be the grantor in the deed, or proven to be such by a credible witness; and the certificate of the officer must state the fact as it shall occur, giving the name of the witness proving his identity, if the grantor is not known to the officer. Where the deed is not acknowledged before an officer, as stated, to be valid must have at least one subscribing witness, who will prove its execution. The officer taking the proof of the subscribing witness must be personally acquainted with him, and must so state the same in the certificate; or he must be proven to be such by the oath or affirmation of a credible witness, which must be set forth in the certificate of the officer. The witness must be acquainted with the grantor to the deed, and prove that he is the person described in the deed, and who executed it; that it was executed by him, as his deed, and that he witnessed it as a witness. The certificate of the officer must set forth these facts to render the proof sufficient. Upon the acknowledgment or proof of the execution of a deed, certified by an officer duly authorized, as stated, the deed is to be recorded in the recorder's office of the county where the lands lie.

The deed of a married woman must be acknowledged by her and her husband before an officer acquainted with them, or who has become acquainted with them by the testimony of a credible witness, whose name is to be given in his certificate. The officer is to examine the woman, separate and apart from her husband, touching the execution of the deed, without the hearing of her husband, and the contents of the deed must be made known to her before she is examined; and on her examination she must declare that she executed the same freely and voluntarily, without compulsion or undue influence of her husband; and that she does not wish to retract the execution of the same. The certificate of the officer must substantially set forth these facts, to be valid. After being certified, the deed can be recorded in the office of the recorder, in the county where the property is situated.

Upon filing a deed for record, it is notice to all persons of

its contents; and all subsequent purchasers or mortgagees will be deemed to purchase with notice. The deed, if not recorded, is good as between the parties to it, but not good as against subsequent purchasers who record their deeds. Powers of attorney to convey or encumber real property must be executed and recorded as deeds; they are good until the revocation is deposited for record, in the office where the power of attorney is recorded.

A deed of conveyance is not necessary to convey a leasehold estate for one year, or less; but, for all greater interests therein, a deed is necessary.(a)

Real property is subject to the same law of descent and distribution that applies to personal property, and may be acquired by purchase at judicial sales, which has been treated of in this work under the head of "Practice in the Probate Courts, and Rights of Creditors."

RIGHTS TO SPECIFIC PERSONAL PROPERTY.

Where a person has a right to specific personal property, withheld from him and against his consent, amounting in value to over five hundred dollars, he must apply to the district court for relief; but if it is less than five hundred dollars in value, then to one of the justices' courts.

To obtain possession of the property, application is necessary to be made to the court, by exhibiting a complaint particularly describing such property, and filing an affidavit that the property belongs to him, or he is entitled to the possession; that it is wrongfully detained from him by the defendant—giving the reason of the detention from his best knowledge and belief on the subject; that it was not taken from him for a tax assessment, or fine pursuant to a statute, or seized under an execution or an attachment against his property; and its actual value to the best of his belief. A summons issues, directing the sheriff to take from the defendant the property, and hold it until delivered to the party entitled to it according to law. After he obtains the order

(a) 1 California Statutes, 249.

for the property, and delivers the same to the sheriff, he must give him an undertaking with two or more sureties to the acceptance of the sheriff, to the effect that they are bound in double the value of the property, as fixed by the affidavit, for the prosecution of the action and return of the property to the defendant, if the return thereof is adjudged by the court, and for the payment to the defendant of such sum as for any cause may be recovered against him. Upon receiving such undertaking, the sheriff will proceed and take possession of the property from the defendant, and hold it. Immediately thereafter the sheriff is to serve the defendant with a copy of the affidavit, order and undertaking, by delivering the same to the defendant personally, if he can be found, or to his agent, if the property was taken from such agent; but if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or if neither have any known place of abode, by putting them into the nearest post-office, directed to the defendant.

If the defendant does not file an undertaking entitling him to the possession of the property until after trial, or except to the sufficiency of the plaintiff's sureties, (or give an undertaking, if he excepts to sufficiency of the plaintiff's sureties,) then, on notice to that effect from the sheriff, the sureties must justify before the court or clerk thereof; upon their justifying, and if no third party presents a claim to the property, the same is to be delivered to the plaintiff. If, however, he does not except, but files an undertaking, the sureties of the defendant, upon notice to the plaintiff of not less nor more than five days, to be given by the sheriff, must justify before the court or clerk thereof. If they justify, and no third party presents a claim to such property, the sheriff is to deliver the same to the defendant. The undertaking of the defendant is to the effect that they are bound in double the value of the property for the delivery of the property to the plaintiff, if delivery thereof is adjudged by the court, and for payment to the plaintiff of such sum as may for any cause be adjudged against the defendant. If a third person should claim the property, after the sheriff has taken the

same into custody, he must do it by stating in an affidavit his claim, together with the grounds of his title thereto, and serve the sheriff with the same. If a claim is so made to the property, the plaintiff is to obtain possession of the property and to indemnify the sheriff by executing and delivering to him an undertaking with two or more sureties in double the value of the property, as named in the affidavit of the plaintiff, accompanied by their affidavit, that each are worth the amount named in the undertaking over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders in the county.

Persons having a claim to personal property so taken by the sheriff, must present them to the sheriff in that way, or lose all right to look to him for it or the value thereof.

The sheriff is to file the order and affidavit, with his proceedings therein, with the clerk of the court in which the action is pending, within twenty days after taking the property.

If the plaintiff has sustained damages by reason of his property being withheld from his possession, he can claim and recover the same in the same action.

Whether the sheriff gives the possession of the property to the plaintiff or defendant, the action is to be prosecuted to a final termination. The trial is to be had before a jury, unless the parties agree to refer the same to referees. If not referred, then by agreement they can waive the jury, and the case will be tried by the court. If not referred nor jury waived, the case must be tried by the jury. On the trial being had, and a decision in favor of the plaintiff, and the property having been delivered to the defendant, the judgment will give the possession of it at once to the plaintiff, and damages for the taking and detention thereof, if they are claimed in the complaint; but in case the property was delivered to the plaintiff, then the judgment will be in favor of the plaintiff for the costs and damages for the taking and detention of the same.

But if the property is required by the judgment to be taken from one and delivered to the other, and is not capable

of delivery, the judgment will then be for its value, and the undertaking of the party against whom judgment is rendered is to stand good for its payment. Thus it will be seen, that in case the plaintiff does not obtain the immediate possession of the property, he will have it or its value secured him by the proceeding.(*a*)

RIGHTS TO REAL PROPERTY.

Where a person has the title to real property, and yet its possession is withheld from him against his consent, and the person withholding it from his possession will not dispute his title to the estate, but his right to the possession, then he must apply for relief to a justice's court having jurisdiction. But where the title to the land, as well as the right to the possession, is disputed, then application is to be made to the district court for that relief that the character of the case demands.(*a*)

(*a*) 2 California Stat., p. 51, ch. 5. (*b*) 2 California Stat., p. 51, ch. 5.

CHAPTER IX.

RIGHTS OF CREDITORS.

The policy of the laws of California is to give every possible facility to the creditor to secure and collect his debt by remedies against the debtor's property. Extreme measures are, however, not to be adopted, unless there has been, on the part of the debtor, unjust and improper conduct in the matter.

It has been the aim of those who have the control of law making, to work a change in the commercial transactions, so far as extends to this state, in reference to the credit system.

To have it given to the property, business, character, and business habits of the applicant, and not to his body or liberty.

The remedies given in favor of a creditor against the property of the debtor will now be considered.

Where a person holds a claim against another, founded on contracts, for more than two hundred, and less than five hundred dollars, he can bring suit on the same in the district court of the county, or in the justice's court of the township where the debtor resides.

Where the claim is for more than five hundred dollars, the proceeding must be had in the district court.

If the claim is against two or more persons, and is beyond the jurisdiction of a justice's court, the proceeding must be before the district court of the county where one of them resides.

If, however, neither of the defendants reside in the state, suit may be brought before any one of the district courts.

The remedies in favor of creditors before justices' courts, will be pointed out under their appropriate heads, to which the reader is respectfully referred.

The law gives to a creditor, whose debt or claim is founded

on a contract for the direct payment of money in this state, and is not secured by mortgage on real or personal property, the right to have his debtor's property attached for the security and collection of his debt.

The attachment may be issued and served at the time of issuing the summons, or at any time thereafter.(*a*)

ATTACHMENT.

The attachment is to be issued by the clerk, on an affidavit being filed, showing that the debt was contracted after the twentieth day of April, 1851, payable in the state, and in money not secured by mortgage on real or personal property, specifying the amount of the debt, over and above any set-off or counter claims. In addition to the affidavit, the plaintiff is to deliver to the clerk an undertaking, with sufficient sureties, in a sum not less than two hundred dollars, nor more than the amount claimed by the plaintiff, to the effect that the plaintiff will pay all costs that may be awarded against him, and all damages which the defendant may sustain by reason of the attachment, not exceeding the sum named in the undertaking. After the affidavit and undertaking have been delivered to the sheriff, he is to call on the defendant, and execute the attachment, unless he gives to the sheriff an undertaking, with at least two good and sufficient sureties, in an amount sufficient to satisfy such demand and costs.

In case the defendant does not give to the sheriff the undertaking named for the security of the claim, then the sheriff is to proceed and attach the property of the defendant not exempt from execution.(*b*)

PROPERTY EXEMPT FROM ATTACHMENT AND EXECUTION.

Chairs, books, tables, and desk, to the value of one hundred dollars.

Necessary household articles, table and kitchen furniture belonging to the defendant or debtor, including stove, stove-

(*a*) 2 Cal. Stat, ch. 5, p. 51. (*b*) 2 Cal. Stat., p. 51.

pipe, and stove furniture, wearing apparel, beds, bedding, and bedsteads, and provisions actually provided for individual or family use, sufficient for one month.

The farming utensils, or implements of husbandry of the defendant or debtor; also two oxen, or two horses, or two mules, and their harness; one cart or wagon, and food for such oxen, horses, or mules, for one month.

The tools and implements of a mechanic, necessary to carry on his trade; the instruments and chests of a surgeon, physician, surveyor, and dentist, necessary to the exercise of their professions, with their professional library, and the law library of an attorney or counsellor.

The tent and furniture, including a table, camp stools, bed and bedding of a miner; also his rocker, shovels, spade, wheelbarrows, pumps, and other instruments used in mining, with provisions necessary for his support for one month.

Two oxen, or two horses, or two mules and their harness, and one cart or wagon, by the use of which a cartman, teamster, or other laborer habitually earns his living; and food for such oxen, horses, or mules, for one month; and a horse, harness, and vehicle used by a physician or surgeon in making his professional visits.

All arms and accoutrements required by law to be kept by any persons.

The homestead of the defendant or debtor, consisting of a quantity of land, together with the dwelling-house thereon, not exceeding in value the sum of five thousand dollars, to be selected by the defendant or debtor.(*a*)

HOW EXECUTED.

The attachment is executed on real property by leaving a copy of the writ with the occupant thereof, if there be any; if not, then by putting a copy in a conspicuous place, and also filing a copy, together with a description of the property attached, with the recorder of the county where the land is situated.

(*a*) 2 California Statutes, 51.

It is executed on personal property by taking the same into possession, if capable of manual delivery. On stocks or shares, or interest in stocks or shares, of any corporation or company, by leaving with the president, or other head of the same, or the secretary, cashier, or managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ.

The attachment is executed on debts and credits, and other personal property not capable of manual delivery, by leaving with the person owing such debts, or having in his possession or under his control such credits or other personal property, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits, or other personal property in his possession, or under his control, belonging to the defendant, are attached, in pursuance to such writ.

The plaintiff or his attorney may notify the sheriff of any person who has credits or personal property belonging to the defendant, or under his control, or who is indebted to the defendant; upon receiving which the sheriff is to execute the writ on such person.

Any person on whom the writ has been executed, having credits or property under his control, at the time of such service, belonging to the defendant, or being indebted to him at the time, is liable to the plaintiff to the amount of such credits, property, or debts, until the attachment is discharged, or the judgment that may be rendered in favor of the plaintiff is satisfied.

The defendant, and any person on whom the writ has been served, may be required to attend before the court or judge thereof, and be examined under oath, touching the credit, property, or debts belonging to the defendant.

The court or judge may, after such examination, order the personal property capable of manual delivery to be delivered to the sheriff upon such terms as may be just, having reference to any liens thereon, or claims against the same, and a

memorandum to be executed of all other personal property, with the amount and description thereof.(a)

RETURN OF THE WRIT.

The sheriff is to make a full inventory of the property attached, and return the same with the writ; and, to enable him to make such inventory, he is to request, at the time of service, the party owing the debt or having the credit, to give him a memorandum of the amount and description of each. If such memorandum is refused, the sheriff is to return the fact of such refusal, and such party so refusing must pay the costs of the proceeding against him, to obtain information on the amounts and description of such debt or credits.

If any property attached is perishable, the same is to be sold by the sheriff, by posting notices of the time and place of sale, in three public places of the township or city where the sale is to take place, for such time as may appear reasonable to the sheriff, considering the character and condition of the property.

The proceeds of the sale, if any made, and the other property attached by the sheriff, are to be retained to answer any judgment that may be recovered in the action, unless the same shall be sooner subjected to sale on an execution upon a judgment rendered previous to the attachment. The sheriff may collect all debts and credits attached, if the same can be done without suit, and his receipt is a full discharge for the amount paid.

If any personal property attached be claimed by a third person as his property, the sheriff is to summon six persons, qualified as jurors, to try the validity of such claim, and at the same time shall give notice to the plaintiff of the claim and time of trial. The plaintiff has the right to appear in person or by attorney and contest the claim before the jury. The sheriff is to swear the jury and witnesses. The claimant and defendant, if the plaintiff shall require it, are to be examined as witnesses. If the jury give their verdict in favor

(a) 2 California Statutes, 51.

of the claimant, the sheriff may deliver to the claimant the property claimed, unless the plaintiff gives to the sheriff a sufficient indemnity for proceeding upon the property as belonging to the defendant. In case the verdict is against the claimant, he is to pay the fees of the jury, sheriff and witnesses; but if in his favor, the plaintiff is to pay them.

If the writ was issued at the time the summons was, then it is to be returned with the summons; but if it was not so issued, then it is to be returned within twenty days after its receipt. The sheriff, at the time he makes return of the writ, is to certify his proceedings thereon, or attach the same to it.

After the attachment has been served, and the defendant has appeared in the court, the defendant may, upon reasonable notice to the plaintiff, make application to the judge who issued the attachment, or to the court, for an order to discharge the same; to obtain which, the defendant is to give an undertaking, with at least two sureties, residents and freeholders in the county, to the effect that the sureties will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding the sum specified. If it is required by the plaintiff that the sureties justify before the judge or court, they are to do so, and, upon that being done, the attachment is to be discharged, by order of the judge or court, and the proceeds of the sale of perishable personal property, if any made, the money collected by the sheriff, and property attached remaining on hand, is to be delivered to the defendant.

If the plaintiff recovers judgment against the defendant, the sheriff is to satisfy the same out of the proceeds of sales of perishable personal property, and the money arising from the collection of debts and credits, if there shall be so much in his hands; if not, then, to satisfy the balance of the judgment, the plaintiff is to have his execution issued and placed in the hands of the sheriff, directing the sale of so much of the property, personal or real, as will satisfy the judgment and costs; and, upon receiving the execution, the sheriff is to proceed, and sell so much of the attached property as will pay the judgment and costs—if there is that amount of property in his hands. If, however, there is not enough money

produced by the sale of the property attached, then the residue is to be made out of the other property of the defendant, subject to execution by a levy.

If the defendant shall give the undertaking either before or after the execution of the writ, and the judgment, after the issuing and return of the execution, shall remain unsatisfied in whole or in part, the plaintiff may prosecute the undertaking given in the case, and in that way collect the amount due on the judgment.(*a*)

JUDGMENT CREDITORS, BEFORE JUSTICE'S COURT.

A creditor having a judgment before a justice's court, can enforce the same by execution thereon, to be issued by the justice, or his successor in office, at any time within five years after its rendition, to the sheriff or constable of the county; and any property of the defendant not exempt from execution, can be levied on and sold to satisfy the same. So soon as the levy is made on real or personal property, the creditor acquires a lien thereon, to the extent of the property, for the payment of his judgment. The personal property is first to be exhausted, before the real property is subject to sale.

If the creditor shall wish an execution sent to a county, other than the one where the judgment was entered, he is to apply to the justice before whom the judgment was entered, or his successor in office, and procure from him a transcript of the judgment, and file the same with the clerk of the county, who is to receive the same, and note the time of its receipt thereon, and enter it in the docket; and on application for that purpose, he is to issue execution on said judgment, to the sheriff of any other county in the state.(*b*)

JUDGMENT CREDITORS BEFORE COURTS OF RECORD.

From the time the judgment is docketed, it becomes a lien in favor of the creditor of the debtor upon all real property in the county, and from the time a certified transcript, by

(*a*) 2 California Statutes, 51. (*b*) 2 California Statutes, 134.

the clerk, of the original docket of the judgment, is filed with the recorder of any other county, it becomes a lien in that county.

Judgment creditors, before the district or other courts of record, are entitled to an execution to enforce the judgment within five years after its rendition, and after that period it can be only issued by order of the court, upon the creditor establishing the fact, by his affidavit or other proof, that the judgment, or part thereof, remains unpaid.

But if no execution has been issued on the same, nor the same is acknowledged by the debtor within five years, then it is barred by the statute of limitations, if the defendant avails himself of it.

If, after the judgment and before the execution of it, the debtor shall die, application is to be made to the probate court for the issuing of the execution and enforcement of the same, which can be done by that court, in the exercise of its discretion, as if the judgment debtor were living. The creditor may have an execution issued to enforce the collection of his judgment, to the sheriff of any county in the state, or several executions to the sheriffs of different counties, at the same time.

The creditor has no interest in the property of the debtor, by virtue of the execution, until after its levy, and then only in that levied upon.

The execution is to be satisfied out of the personal property of the debtor, if there is enough to do it; if not, then the deficiency to be made out of his property.

Property exempt from execution, is not subject to levy and sale; but on the other property of the debtor, the execution can be levied. The personal property, if perishable, the sheriff is to sell, by posting written notices of the time and place of sale, in three public places of the township or city where the sale is to take place, for such time as may appear to the sheriff reasonable, considering the character of the property; and he is to sell the personal property, not perishable, by posting written notices in three public places, in the township or city where the sale is to take place, not less than five nor more than ten days successively; the real

property by posting written notices, particularly describing the property, in three public places in the city or township where the property is situated, and also where the property is to be sold, for twenty days successively, and publishing a copy of such notice, once a week, in a newspaper in the county, if there be one. The sale of personal property is absolute; so, too, is a leasehold estate in real property of less than two years unexpired term. All other real property is subject to redemption, by the debtor or his successor, in interest, within six months after the sale, on payment of the amount of sale and eighteen per cent. thereon.(a)

CREDITOR BY LIEN ON PERSONAL PROPERTY.

A lien on personal property may be acquired under a contract with the owner thereof.

Such contract, however, if it is not to be executed within twelve months, must be reduced to writing, the consideration stated therein, and signed by the party to be bound thereby. If within the year, then it will be good, if made verbally. But such contract is not good, except as between the parties to it, unless the lien holder, at the time, receive and retain possession and control of the property. The creditors of the owner, while in his possession, may attach or levy on the same, to pay their claim or claims, or the owner may sell and deliver the property to a purchaser in good faith.

If a person shall advance money, labor or property, to another, for a lien or mortgage upon personal property in the other's possession, he does it upon his responsibility, and subject to the risk of being attached or levied on by his creditor, or sold by himself, so long as the same remains in his possession. If the lien holder does not wish to be subject to such casualities, he must, at the time of making his contract for the lien or mortgage, take the property in his own possession and control. Where a creditor having sold personal property to another on credit, and that person still holds the

(a) 2 California Statutes, 51.

same in his possession, the creditor can attach, or levy, and sell such property to pay his debts; the statute not exempting such property from attachment or execution to pay the debt created for its purchase. The person who advances money on personal property, has a lien upon the property for the amount of such advances, so long as he retains the possession thereof; if he parts with the possession, he loses his lien.

The same rule holds in reference to all advances on personal property, made by agents, commission merchants, factors, warehousemen, and masters of vessels. But the change of possesion is not necessary in contracts of bottomry, respondentia assignments, or mortgages, and hypothecations of vessels at sea, in foreign states, or without this state, provided the assignee or mortgagee take possession of the vessel as soon as may be practicable, after the arrival thereof, within the state;(a) so, too, in reference to contracts of assignment for any mortgages, or other liens on personal property, at sea, in foreign states, or without this state, provided the assignee, mortgagee or lien holder take possession and control of the same, as soon as may be practicable, after the arrival thereof in this state. The creditor who advances upon property shipped to this state in vessels, must do it on an assignment of the shipping bill, and the shipping bill is the title to the property shipped. There are generally three bills, one sent to the consignee, one kept by the freightor, and one retained by the master of the vessel. When the shipping bill is to order, or assigns of the consignee, it is transferable by indorsement, and when indorsed and delivered by him to a bona fide holder, in good faith, for a valuable consideration, the title to the property passes with it; and on the vessel carrying the goods coming into port, the holder of the shipping bill is entitled to the possession and control of the property.(b)

By the bill of lading, the master contracts to carry the property to the consignee, or his order or assigns. This makes the owners common carriers, the master acting as

(a) 1 California Statutes, 266. (b) 1 California Statutes, 266.

their agent in the matter. If a person advances on property and receives an assignment of the shipping bill, he has the responsibility of the owners for the delivery of the goods according to the contract, in case they are not lost or injured by the act of God, by public enemies, or perils of the sea. If lost, then whether the loss has so happened or not are questions of fact. If the vessel was consumed by fire, produced by lightning, that is the act of God; if caught from another cause, which could have been prevented by the power and sagacity of a skilful and careful master and crew, the owners are liable. If destroyed by pirates, it is one of the perils of the sea, and no liability can attach to the owners.(*a*)

A mechanic or artizan furnishing materials and labor, to make, alter, or repair any article of personal property, at the request of the owner or possessor of such property, has a lien on the same for such labor and materials, and has the right to hold possession of the property until his lien is paid; and if not paid within two months after the work is completed, such mechanic or artizan has the right to sell the property at public auction, by giving public notice three weeks next before the sale, stating the time and place thereof, in a newspaper published in the county where the work was done; if no paper is published in the county, then by posting up three such notices in the most public places in the town or place where the work was done, for the same time. The proceeds of sale are to be applied to the payment of the lien, and expenses of keeping and selling the property, and the residue, if any, is to be paid over to the owner or possessor of such property. But, in case the proceeds of such sale are not sufficient, then the person who employed the mechanic or artizan, is liable therefor.(*b*) Where advances have been made upon personal property, and a mortgage or other lien is taken thereon, for the payment thereof, and the debtor fails to pay at the time specified, the enforcement of the lien is to be governed by the contract between the parties. But if no stipulation is made by the parties in reference to the manner in which the lien

(*a*) 3 Kent's Com. 275. (*b*) 1 California Statutes, 211.

is to be enforced, the creditor must give the debtor notice to redeem, and allow the debtor reasonable time from the service of notice to do it in. That which is reasonable time to redeem in, from service of notice, will depend upon the character of the transaction and place where it occurs. If the debtor fails to redeem, then the creditor has the right to sell the property, and apply the proceeds to his debt, and expenses incident to the matter. The sale is to be at public auction, and at a time and place usual for the sale of such property, after giving the usual notice for sales of that character and description. If the debt was due, and no time limited for the enforcement of the lien, at the the time of the pledging, then the creditor is to give notice to redeem, and allow a reasonable time to elapse before he proceeds to have the property sold. If, after the property has been pledged, the creditor shall make further advances to the debtor, as a lien on the property pledged to create such lien for those advances, it must be agreed between the parties to that effect. The creditor receiving a pledge, is bound to take the usual care that persons generally give to such property, and in case it is stolen, lost, destroyed, or injured, the loss will be that of the debtor. If any of these accidents, or others, overtake the pledge, and the creditor shows that he took the ordinary care that persons give to such property, no liability will attach to him. If the property pledged be such, that the use of it will produce injury to its value, then the creditor cannot use it. If a cow or horse be pledged, the creditor can ride the horse moderately, and milk the cow regularly as his own. Profits arising from the property pledged, must be accounted for with the debtor, and for all necessary expenses he is liable.

The creditor may assign and transfer his lien, together with the possession of the property pledged, and upon that being done, the assignee is subrogated to all the rights and liabilities of the creditor.

A factor cannot pledge his principal's personal property, to secure money loaned thereon, and if money is loaned upon it, and given by the factor into the possession and

control of his creditor, no lien on or interest in it is acquired by the creditor.

LIENS ON REAL PROPERTY.

A creditor, by attachment, acquires a lien on the real property of the debtor attached, to the amount of the claim, and after judgment in a court of record, the creditor acquires a lien on the real estate of the debtor, in the county where the judgment is taken, and in any other county of the state, upon filing a transcript of the docket of the judgment, certified by the clerk, with the recorder of such county. After a levy of an execution, to enforce a judgment rendered by a justice's court, upon the real property of the debtor, the creditor acquires a lien thereon for the payment of his judgment; these liens may be enforced by the sale of the property in the manner pointed out by the law.(*a*)

LIEN ON BUILDINGS OR WHARFS FOR LABOR OR MATERIALS.

All persons furnishing materials or labor for the construction or repair of any building or wharf, have a lien thereon for the same.

To enable persons to acquire such lien, it is necessary for him, within sixty days after the completion of the building or repairs, to file in the recorder's office of the county where the building or wharf is situated, a notice of his intention to hold a lien on the property for the amount due and claimed, and set the same forth in such notice specifically, which notice the recorder is to file. It then becomes a lien.

The creditor can hold such lien but one year after the work was done or material furnished, unless he bring suit to enforce the collection of the amount due thereon. But in case a credit was given to pay for the work or labor for not more than one year, then the suit must be brought within one year after the credit expires. If, however, the credit is for a longer period than one year, then suit is to be brought

(*a*) 2 California Statutes, 51.

within two years from the time the work was done or materials furnished. The lien covers the building and not over five hundred square feet of land clear of and adjacent to the same, if so much is owned at the time of erection by those who contracted to have the work done.

The lien so to be perfected will hold the land and building or wharf against all subsequent incumbrances upon the property after the work was commenced or material furnished, but not those existing prior thereto.

If a person having a leasehold interest in property contracts to have a building erected or repaired, the interest he held in the real property at the commencement of the work or delivery of the materials, and no more, will be held and bound by the lien. Persons who put work or materials upon a building, if they do not wish to give credit alone to the personal responsibility of him who employs them, should look well into the character of the title to the land on which the building is to be erected, or is situated. There is another class of creditors that the law has shown the most tender care and regard for; they are those who give their work or materials to the person who contracts to do the work for the owner. They are protected from loss by having the right of creating a lien in their favor for the amount due them on the building or wharf, if there is so much due to their employer from the owner.

The act of 1853 extends the mechanic's lien to bridges, ditches, flumes or aqueducts.(*a*)

To procure such lien he must give notice in writing to the owner of the building or wharf on which he worked, or for which he furnished materials, setting forth specifically the amount due him therefor from his employer. On this being done, the owner is liable if he owes the employer that much; if not, then to the extent of his indebtedness to him. But to preserve the lien, he must present to his employer or contractor a copy of the notice given to the owner for his indorsement. Then the owner is to pay the same, if he is indebted in that amount to the contractor; if not, then the

(*a*) Laws of 1853, 202, 203.

amount due at the time of the service of the notice on him. If he fails or refuses so to pay, then, within thirty days after the notice was given, he is to commence suit against him to enforce his lien. But if, by the agreement between the owner and contractor, the money is payable at a future day, he is then to file in the recorder's office in the county where the building or wharf is situated the copy of the notice with the indorsement thereon, and must then bring suit against the owner, to collect the money for which he holds the lien, within thirty days after the money becomes due; and if suit is not so brought at the two periods specified, the lien is lost.

If the employer or contractor, after notice given to the owner on demand made for that purpose, refuses to indorse the copy notice served on the owner, then he must commence suit against the employer or contractor, to establish the amount of his claim, within thirty days after the service of notice; and if he recovers judgment against his employer, he is to commence suit against the owner within thirty days thereafter, if the money coming from the owner to the employer or contractor, at the time of the service of notice, is due. If the money is not due, then he is to file, in the office of the recorder of the county where the building or wharf is situated, a written notice of said claim and transcript of the judgment, and bring his suit against the owner thereof, within thirty days after the money becomes due and payable; and unless he brings his suit at the periods named, and files the notice and judgment, he will lose his lien.

In this way, the laborer who works on a building or wharf, or one who furnishes materials for the same, can secure his debt against his employer or contractor by presenting his claim to the owner of the building, and perfecting the lien on the building or wharf in the manner pointed out, if there shall be coming to the employer or contractor that amount at the time the notice is served upon him. If there is not so much coming, then he will be entitled to collect whatever there is, and hold the employer or contractor for the residue.

A lien thus established is good against the property,

although it be a homestead; the law exempting homesteads from forced sales does not protect them against such demands.(a)

LIEN BY MORTGAGE.

The character of a mortgage on real property is but a lien on the same to the extent of the debt and interest; it gives no right to the rents or profits, or to the possession of the property, to the creditor before or after failure of condition. He has but the right to bring suit upon his lien, to foreclose the mortgage by sale of the mortgaged premises. The court may direct the whole, or any part to be sold, the proceeds to pay the debt and costs; and after all the mortgaged property has been sold and the proceeds applied, and there shall be a balance due the creditor, the creditor is entitled to an execution in his favor against the debtor for the balance.(b)

If the debt is payable at different periods, and but part is due, then, so much and no more of the property is to be sold than will be sufficient to pay the amount due; and as the residue becomes due, the court, on motion, will order property sold to pay it. But if a portion of the property cannot be sold without injury to the parties, then the whole is to be sold; and if the debt is not all due, a rebate of interest is to be made.(c) The sale will be subject to redemption in favor of the mortgagor and those who claim under him. The purchaser is entitled to possession if the same is not redeemed. Where the mortgaged property is in possession of a tenant, the purchaser is entitled to the rents or value of the use and occupation of the property, but not if in the mortgagor's possession.(d) The purchaser can prevent the person in possession from committing waste. A mortgage must be executed and acknowledged, or proved before a judge or clerk of a court having a seal, a notary public, or a justice of the peace of the county where taken; if acknowledged or proved without this state, and within the United

(a) 1 California Statutes, 211.
(b) 2 California Statutes, 91, 93.
(c) 2 California Statutes, 92.
(d) 2 California Statutes, 88.

States, by some judge or clerk of any court of the United States, or any state or territory having a seal, or any commissioner appointed by the government of this state for that purpose; if acknowledged or proved without the United States, by some judge or clerk of any state, kingdom, or empire, having a seal, or by any notary public, or by any minister, commissioner, or consul of the United States, appointed to reside there. Where the acknowledgement is taken by a judge or clerk, the certificate is to be under the hand of such judge or clerk, and the seal of the court. Where it is taken by an officer who has a seal of office, then under the hand and official seal of such officer.

The mortgagor must be known to the officer taking the acknowledgement, or proven to be the person by a credible witness, which must appear in the certificate; but if the mortgage is proven to have been executed, it must be by one of the subscribing witnesses. When all the subscribing witnesses are dead, or cannot be found, then by the evidence of the hand-writing of the mortgagor, and of at least one subscribing witness, given by a credible witness to each signature. Witnesses must be known to the officer, or proven to be such by a credible witness who is known to him. The execution of the mortgage is valid, if acknowledged before an officer, or proven by a subscribing witness. The mortgage takes effect so soon as it is delivered to the recorder of the county for record; the validity of the lien will depend upon the ability and right of the mortgagor to create a lien on the property mortgaged.(*a*)

CREDITORS OF VESSELS AND BOATS.

Steamers, vessels, and boats are bound by the contracts of their owners, masters, agents, or consignees, for materials furnished for their construction, repair, or equipment; for services rendered on board; for non-performance, or mal-performance, in the transportation of persons or property; for injuries committed by them to persons or property. Claims against a steamer, vessel, or boat may be a lien

(*a*) 1 California Statutes, 249.

thereon, by attachment or levy. The claims in favor of the mariners, boatmen, and others employed in the service of such steamers, vessel, or boat, have a preference, and a prior lien. The master has no lien on the steamer, vessel, or boat, and freight, for his services or advances. He, as the agent, can create liens in favor of others; but for his own advances and services, he must look to the owners. Their responsibility is all he has to indemnify him on account thereof.

The proceeding to recover a claim from a steamer, vessel, or boat, differs but little from proceedings against an individual. The complaint must be verified by affidavit of the plaintiff, or some person for him, and a summons must be issued against the steamer, vessel, or boat, by name, and served on the master, mate, or any person having the charge thereof. The plaintiff can have his attachment for any of the causes of action named above, as against an individual; but when against a steamer or vessel, the sum to be named in the undertaking is to be at least five hundred dollars; and against a boat, not less than two hundred dollars. The attachment is to be served, unless the owner, master, agent, or consignee, gives an undertaking in a sum sufficient to satisfy the demand. The sureties to the undertaking are to verify, as in cases against individuals.

After the service of an attachment in an action not founded on a claim in favor of mariners, boatmen, or other persons, for services on the steamer, vessel, or boat, and appearance of the defendant, the same may be discharged, as between individuals; except where one or more of the mariners, boatmen, or other persons employed in the service of such steamer, vessel, or boat, shall present his claim to the court; in that case, the attachment cannot be discharged, unless such claim be proved. And further, in such a case, it is incumbent upon the plaintiff and clerk, in issuing the execution upon the judgment rendered, to direct the sheriff to pay such claim before the plaintiffs.

The claim of a mariner, boatman, or other person in the service of the steamer, vessel, or boat, in such a case, is to be presented to the clerk of the court when the attachment was issued, by filing an affidavit setting forth such claim,

with a particular statement of the services rendered. After the filing of the affidavit, such claimant is to serve the steamer, vessel, or boat, with written notice of the filing of the affidavit and making such claim; and if not contested within five days after the service of notice, then the same is to be deemed admitted; but if contested, the clerk is to refer the matter to a single referee, to take testimony and decide upon the claim, or the clerk may do it himself. The referee or clerk, after their decision in the matter, is to report the same to the county judge, whose judgment in the matter is final. On the review, the judge may use the minutes of the proofs taken by the clerk or referee.(*a*)

From orders and judgments entered in proceedings against steamers, vessels, or boats, appeals may be taken, as in other cases.(*b*)

CREDITORS OF BANKRUPTS.

On the fourth day of May, 1852, a bankrupt law was passed, giving the right to all insolvent debtors to avail themselves of it.(*c*) A creditor's claim against the bankrupt's property, or one who avails himself of it, extends to a dividend of the proceeds thereof; but any creditor whose debt was made prior to its passage, is not subject to it. Nor does the statute operate on a debt payable out of the state, or made out of the state, and the place of payment not named, or made in this state and payable in another. But it will operate on a debt created in another state or country, and payable in this.(*d*) The debt must be included in the schedule of the bankrupt, and not have been credited by failing to pay public funds, or delivering public property, or money or goods deposited, or received as bankers, brokers, or commission merchants, or money, goods, or effects received by them in a judicial capacity. The debtor avails himself of the law, by transferring his property to trustees, except that which is exempt from attachment and execution.

(*a*) 2 California Statutes, 101.

(*b*) 2 California Statutes, 101.

(*c*) 3 California Statutes, 69.

(*d*) 1 Story on Con. 428; 2 Kent. 470, 471; Story's Con. 338, 9, and 40.

The trustees sell it, and divide among the creditors the proceeds thereof. Upon transferring his property, and having the benefit of the statute extended to him, the creditor has no further claim for a debt, subject to the statute, against him, which can be enforced against his person, or property he may subsequently acquire, and the debtor is forever discharged from the legal obligation of such liabilities. When a debt is not subject to the statute, and the creditor shall present his claim to the assignees of the bankrupt, and receive a dividend thereon, this binds the creditor of such debt to abide by the statute.

Having pointed out the remedies a creditor has against the property of his debtor to compel the collection of his debts, by the interposition of the judicial and executive powers of the state, I shall next show the extent of the remedies against the person of their debtor. A creditor having a claim, arising upon contract express or implied, when the debtor is about to start from the state, with intent to defraud his creditors; or where the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors; or where the claim was made by the defendant acting as an attorney, factor, broker, agent, or clerk, in the course of their employment as such; or for money or goods received in a fiduciary capacity; or for misconduct or neglect in a professional employment; or for a wilful violation of duty; or where the claim arose on account of the defendant unjustly detaining personal property, by concealing the same, or by removing or disposing of it; or where the defendant has been guilty of fraud in contracting the debt, or incurring the obligation.

The order of arrest is issued by the judge of the court in which the action is brought, or by the county judge, if a sufficient cause of action shall appear by affidavit. The affidavit is to be either positive or upon information and belief; and when upon information and belief, the facts must be stated upon which they are founded. The affidavit is to be filed with the clerk, if the order is issued; and, in addition to the affidavit, the plaintiff is to give an undertaking, with two or more sureties, in a sum not less than five hun-

dred dollars, to the effect that if the defendant recover judgment, the plaintiff will pay all costs and charges that may be awarded against the plaintiff, and all damages which he may sustain by reason of the arrest. Each of the sureties must be worth double the amount stated in the undertaking over and above their debts and liabilities, exclusive of property exempt from execution; and they must be residents and householders or freeholders in the state.

The order of arrest may accompany the summons, or can issue at any time thereafter, and must state the amount in which the defendant is to be held to bail. After the sheriff shall arrest the defendant, he is to deliver him a copy of the affidavit, and, if desired, a copy of the order.

The defendant may be discharged by giving an undertaking in the amount named in the order of arrest, with two or more sureties, stating their places of residence and occupations, to the effect that they are bound to that extent if the defendant does not at all times render himself amenable to the process of the court, during the pendency of the action, and such as may be issued to enforce the judgment.

If the defendant gives the undertaking, he is to be discharged from arrest. Within the time limited for the return of the order of arrest, the sheriff is to return the same, with his proceedings indorsed thereon, together with a copy of the undertaking. The plaintiff must except to the sureties in ten days thereafter, or not at all. If he excepts to them, he must serve a written notice on the sheriff to that effect. If no exceptions are taken to the sureties, the original undertaking is to be filed with the clerk.

In case the plaintiff excepts to the sureties, the sheriff, within five days after receipt of the notice, or the defendant, is to give the plaintiff notice that the sureties or others in their place will justify before a judge of the court, county judge, or clerk, naming the time and place to be not less than five nor more than ten days thereafter, except by consent of parties.

In the event other bail are given, it must be on a new undertaking. The plaintiff can examine the bail under oath, touching their sufficiency; and the examination, if the

plaintiff requires it, is to be reduced to writing and subscribed by the bail. If the judge or clerk find the bail sufficient, he is to indorse his allowance on the undertaking; and in case the examination is reduced to writing and signed by the bail, that is to be attached thereto, and filed, or he is to cause the same to be filed; and, upon that being done, the sheriff is exonerated from liability.

In case the defendant does not give the undertaking, he can make a deposite of money, of the amount for which security is required, with the sheriff; and, upon that being done, the sheriff is to give to the defendant a certificate of the same, and to discharge him. On receiving the deposite, the sheriff is to pay the same to the clerk and take duplicate certificates of such payment, and deliver or transmit one to the plaintiff or his attorney, the other to the defendant.

In case a deposite of money is made, it can be withdrawn by the defendant at any time before judgment, on giving the undertaking and justifying the bail, on notice to the plaintiff; but if not, the money is to be applied to the payment of the judgment, and the residue, if any, is to be refunded to the defendant by the like order of the court.(*a*)

LIABILITY OF THE SHERIFF.

The sheriff has power to make the arrest within his county; and his duty, on receiving the order of arrest, is to arrest the defendant as soon as the nature of the thing will admit, allowing no delay, and using no greater force or violence than is necessary to do it.

The plaintiff is not bound to give the sheriff a description of the person to be arrested, or information where he may be found; but, to insure the arrest, he should give such information, if known to him, especially where the defendant is not a person having a known place of residence, or personally known to the sheriff.

It is the duty of the sheriff, immediately after receiving the order of arrest, to proceed to its execution by going first

(*a*) 2 California Statutes, 61.

to the residence of the defendant, if he have one; if not, then to his boarding house, if he have one; if not, then to his place of business, if he have one, and is known to the sheriff; or if he have neither residence, boarding-house, or place of business, and his whereabouts is not known to the sheriff: then that he shall hunt for and find the same, as soon as he can, using due diligence; but if, after looking for him at his residence, boarding-house, or place of business, as the case may be, without success, he cannot ascertain where to find him, by making inquiry of those at his residence, boarding-house, or place of business, if he have one; but if none there to make inquiry of, then to make inquiry from those most likely to know, using his best information and skill in the matter: or, if the defendant shall not have a residence, nor boarding-house, or place of business, then to make diligent inquiry of those likely to know where the defendant may be found. If, after these things are done by the sheriff, the defendant cannot be found, no liability can attach to the sheriff for not making the arrest. But if he fails to pursue the defendant in that manner, and, had he have done it the defendant could have been arrested, then he is liable, no matter what he returns on the order.

In case the defendant is a non-resident of the county, and his whereabouts and person are not known to the sheriff, then a diligent inquiry and search for him, on the part of the sheriff, will exonerate him from liability in not making the arrest. And where the defendant is known to the sheriff, and his whereabouts not, and the sheriff makes diligent search for him, according to his best skill and information, and fails, he is not liable.

If the defendant, after he is arrested, shall escape or is rescued, the sheriff is liable as bail. But he may, at any time before judgment, discharge himself, and give an undertaking, with sureties, as the defendant has a right to do. The sheriff at any time before the undertaking is given by him, may retake the defendant and release himself from liability; or, after the undertaking has been given, and before ten days after judgment, the sureties may surrender the de-

fendant into custody of the sheriff and release themselves from liability.

The sheriff, if he becomes liable for not making the arrest, or if, after it is made, he suffers an escape or rescue of the defendant, and judgment be recovered thereon, and execution returned not satisfied, in whole or in part, his official bond may be proceeded on, for its recovery.(*a*)

As to the time within which a creditor must bring suit upon his claim against his debtor, that will depend upon the character of the claim or nature of the debtor's liability.

There are two statutes of limitation in this state; one passed 22d April, 1850, the other on 4th May, 1852. By these statutes, the times are fixed within which a party may bring suit in one of the courts of the state.(*b*) A state has the constitutional right to pass such statutes, and they operate on contracts made beyond, as well as those executed within the state.(*c*) They form no part of the contract, but are part of the remedy, and are only available to parties within this state.(*d*)

On a judgment rendered in this state, five years; on a contract, obligation or liability, founded upon an instrument of writing, except judgments, within five years; on a liability created by statute, other than a penalty or forfeiture, within three years; on a contract, obligation or liability, not founded upon an instrument of writing, other than an open account or an article charged in a store account, two years; on a liability against a sheriff, coroner, or constable, for doing an act or omitting to do it, including non-payment of money on an execution, except for an escape, within two years.

On a liability of a sheriff or other officer, for the escape of a prisoner arrested or imprisoned on civil process, within one year.

On an open account for goods, wares and merchandize, sold and delivered, or for an article charged in a store account, within one year.

The statute runs against an account from the time of the

(*a*) 2 California Statutes, 51.
(*b*) 1 California Statutes, 343.
(*c*) 3 California Statutes, 161.
(*d*) Story on Confl. s. 580; 2 Kent. 578.

last charge proved in the account, on either side. On all actions where the causes thereof accrued before the act, (22d April, 1850,) the parties have the time limited within which to bring their suits after the passage of the act. Any action upon a contract, obligation or liability, for the payment of money, founded upon an instrument of writing, executed out of this state, when more than two and less than five years have elapsed since the cause of action accrued, must be brought within one year. Where more than five years have elapsed, then within six months. On a judgment rendered out of the state, and more than two and less than five years have elapsed, within one year; where five years has elapsed, then within six months.

Where the cause of action has arisen in another state or territory of the United States, or in a foreign country, and, by the laws of the place where the action accrued, no action could be maintained on account of the lapse of time, none can be maintained here.(*a*)

FOREIGN CREDITOR.

A creditor residing in another country, is entitled to the aid of our courts to enforce all legal and binding contracts, and the same remedies are to be administered in his favor as are administered in favor of a citizen.

He may acquire liens on personal and real property within the state, and do and transact business here with either foreigners or citizens, and his contracts, which he may make here or elsewhere, will be enforced for him as fully and perfectly as if he were himself a citizen. Contracts for the payment of money entered into, or celebrated out of this state, are subject to the law of the place where entered into or celebrated.

In all contracts made in another state or country, care must be taken in considering the validity of the contract, and rights of parties under it separately from the manner of its celebration, and the remedies given, when its execution is sought to be enforced against the parties to it, in default.

(*a*) 3 California Statutes, 161.

If a contract is entered into in a foreign country, and by its terms it is to be performed in this state, to make the contract binding here, the manner of entering into it, as well as the contract itself, must be consistent with our laws.

So, if a person shall make his negotiable note in Paris, and deliver it, for a valuable consideration, payable in San Francisco, its legality must be determined by our laws. The fact of its being payable here, makes it a California contract. The interpretation or meaning and extent of the rights and liability of the parties, are to be fixed and settled by our law; and if the obligor is, by our law, discharged from his liability, the courts in every county will enforce such discharge. The power that gives force and validity to the contract, can also fix and determine its destruction. Such contract would be subject to the bankrupt laws of the state, and a discharge of the debtor's legal liability under such law would be good anywhere, and could be pleaded in bar of an action in another country, upon the same cause. In contracts where the place of payment is the same as its celebration, or if no place is named for its payment or execution, in either case, the law then in force at such place determines its force and validity, and in case suit is brought in our state, upon such contract, the law of the place of its celebration, or lex loci contractus, fixes the rights of the parties under the contract, and our law gives the remedy for its execution.

But there are exceptions to this rule. Contracts made in foreign countries, which contravene the revenue laws of the country where the contract is entered into, are one of the exceptions. Another exception is where the thing contracted about, is to be used in violation of the laws of the country where the contract is sought to be enforced, and this is known by the parties at the time of its celebration. Examples of the first class are, contracts for goods smuggled out of the country where the contract is entered into, or sold to be thus smuggled. Examples of the second class are, contracts for goods to be smuggled into the country where the contract is sought to be enforced. If the contract is sought to be enforced in the country where it was celebrated, there it can have no binding force, as it violated the law where it was

created, which renders it void. If in any other country, the tribunals should give it no more force and validity than it had where it was created or celebrated. In the cases where goods are sold to be smuggled in violation of the laws of another country, if the contract is sought to be enforced in the country whose laws it was made to violate, the tribunals of that country can give it no validity.

In this state, a contract made to violate the laws of the United States, will not be enforced; nor will a contract made to violate the laws of the country where the same was entered into or celebrated. Whether a contract made in one country to violate the revenue laws of another, can be enforced where it was made, is a question not perfectly settled by authority; but upon principle, such contracts should be treated as invalid by every country.

Another class of contracts within the exception, are those against good morals, or religion, or public rights. Such are contracts made in a foreign country for future illicit cohabitation and prostitution; contracts for the publication of irreligious and obscene publications; contracts to promote or reward the commission of crimes; contracts to corrupt or evade the due administration of justice; and all contracts founded in moral turpitude, and opposed to the good order and interests of society. Whether these contracts are valid or not where they were entered into, they are not valid here.

There is another class of cases within the exception. They are such as are in opposition to the national policy, and the institutions of our country.

Contracts to carry on trade with the enemy, or to cover enemy's property, or contraband of war, and to carry into effect the African slave trade, or rights of slavery, in countries that consider it and its trade unlawful. In all such cases, the contracts would be considered invalid and void, whatever might be their validity in the country where they were entered into.

Contracts made in a foreign state, with regard to interest, and, by implication, payable where entered into, must conform to the rate of interest allowed by law, at such place.

Where they are, by express terms or implication, payable in another state, it must be consistent with the legal rates there. A contract made payable in this state, may be for any rate of interest, as we have no law against any amount of interest the parties may agree to. In the absence of contract on the subject, the rate is fixed at ten per cent. per annum. The taking of security, in this state, on real or personal property where the contract is celebrated, or in another country, will not alter the law in regard to the rights of the parties or the rates of interest fixed thereby. If there is no place fixed for the performance of the contract, the lex loci contractus settle the validity of the contract, the extent and rights of the parties, and the interest it shall bear. But where there is a place of payment, the law there does it, notwithstanding the creditor may take personal or real property as security for the performanee of the contract.

Where a contract is made in a foreign country, for the payment of a certain amount, in a particular kind of property, in another state, at a particular time, the law of the place of payment is to govern as to the amount of damages.

In regard to bills of exchange, where the drawer draws it in one country, the indorser indorses it in another, and the drawer accepts it in this state, if the bill is dishonored, and protest made according to our law, this being place of payment, each party is bound according to the law of their respective countries, as to damages and interest; and the drawer in his, to the amount of damages allowed by the law. So too the indorser, and the like with the drawee; each transaction, of drawing, indorsing and accepting being separate contracts and the lex loci contractus, applying to each. It is not so, with a promissory note negotiable. That is but one transaction, one contract, and every subsequent indorsement is but a subrogation of the indorser to the rights and duties of the payee. If the note is payable at a place named therein, the law of such place governs the validity of it. If no place is named where it is to be paid, the law fixes the place of its celebration for payment, and the law of such place determines the validity and rights of the parties.

After the maturity of a contract for the payment of money,

and a failure of performance, the obligation follows the obligor wherever he may go. It has no locality. It is always in existence, until by its own terms it is discharged by the obligor, or by the power, or one equally potent, to the one that gives it life and vigor. If, where the contract is made or is to be performed, a custom should exist which controls or limits the liability of the parties, wherever such contract is litigated, it is to be construed in reference to such custom to settle the right of the parties to it. The laws of the place where the contract is made, or is to be performed, is to govern as to its construction. So, too, in reference to the ability of the parties to contract: if by such law the parties were minors, and therefore unable to contract, the lex loci contractus governs, whether it agrees with the lex fori, or not. A lien, acquired by a foreign contract to real property or interest therein, within our state, must be done in reference to the formalities and ability of the person creating the same; no lien can be created otherwise.

A lien by a foreign contract, to personal property within our state, cannot be created unless it is done in conformity to our laws. At common law, a sale or mortgage is good, without delivery, against creditors or subsequent purchases. It is not so with us. We have adopted the civil law rule on that subject. The possession must accompany the transfer of the title, to be good against creditors and subsequent purchasers. Property afloat, or at sea, and not capable of delivery at the time of sale or mortgage, can be transferred or lien created thereon, if the purchaser or lien holder shall take possession of the same, as soon as may be practicable, after arriving in port.

A transfer of the title papers of a steamer, vessel or boat, if afloat or at sea, and in addition thereto, possession as soon as shall be practicable, on arrival of the same in port, is necessary to a valid sale or lien.(*a*)

(*a*) Story on Conflict, 338; 4 Martin's L. R. 20; 5 Martin 29; 7 Martin R. 24; 14 Martin R. 93; Story on Conflict, 324.

FOREIGN JUDGMENTS.

I will now consider the effect of judgments of foreign countries, that have operated upon property subsequently brought into our state, or judgments attempted to be enforced against the property or person of the debtor within the state, or judgments pleaded as a counter claim by a defendant sued in our courts, or as a bar to a recovery upon the same subject matter, litigated before a foreign tribunal.

A judgment *in rem*, when the court that pronounces the sentence, or gives the judgment, had jurisdiction of the property it operates on, and power to decide the questions decided, is obligatory as to all things it professes to decide in relation thereto.

But the power of the court may be questioned as to the property it operates on, and the questions decided; and, but if found clothed therewith, whatever it settles as to the right or title, or whatever disposition it makes of such property, will be held valid here. Such are judgment *in rem* by foreign courts of admiralty, in causes of prize, bottomry, salvage, or forfeiture; and judgments of other courts exercising like powers; and also judgments and proceedings against real and personal property by way of foreign attachment, or against debts in favor of creditors.

In all these cases, the judgment and proceedings of such courts, having the power over the property and questions decided, are exclusive as to the disposition, transfer and title to such property, and as to the points decided, and the facts and allegations upon which it professes to be founded. Such is the effect that the common law of England gives to such judgments and the proceedings under them; and, as we have adopted that law when not inconsistent with the constitutional treaties and statutes of the United States, and the constitution and statutes of this state, I consider the rule of the common law on the subject, as the settled law of our state.(*a*) In some of the states, the common law rule is adopted to its fullest extent, while in others it is not. In

(*a*) 1 California Statutes, 219.

the latter, the judgments are held conclusive, *in rem*, only so far as to give and pass title to the property; but they may be controverted as to all the incidental grounds and facts, on which they profess to be founded.(*a*)

As to a foreign judgment sought to be enforced against the property or person of the debtor, within our state, the judgment is not to have the force given it when rendered and entered, but is to be treated as prima facie evidence of the existence of a debt. But may be impeached for the reason that the court had no jurisdiction, or that the person against whom the judgment is to be enforced did not have legal notice, or that the judgment was procured by fraud, or that upon its face it is founded in mistake, or that by the local law, it is irregular; any of these grounds, are sufficient to impeach the judgment, and distroy it as evidence of a debt, or obligation.

There is no distinction between a judgment in a foreign country, and a judgment in any one of the other states of the United States. The clause, that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, does not prevent the judgment from being impeached, for the reasons stated. Where a court, in the exercise of power and jurisdiction given it by one of the states of the United States, over property and persons, shall exercise the same by rendering a judgment, full faith and credit is required to be given to such act in another state; but no greater credit than what will be given and extended to it, in the state where the same was rendered. Judgments can be impeached where rendered, for the reasons above named, and upon the same grounds, are impeachable in another state. It is evidence of a debt where rendered, and is so here; and unless impeached, is so received: and can be the foundation of a judgment in one of our courts. In this way, all the faith and credit required by the constitution is given. In foreign judgments, there is no distinction made as to the persons

(*a*) Starkie on Ev. p. 2 and 238; 4 Cowen R. 520, and cases there cited; 4 Cranch, 434; 7 Cranch, 423; 4 Johns. R. 34; Story on Confl., 496; Starkie on Ev. p. 2, 67, 80 and 81, 336; 3 Wheaton Rep. 246; 3 East Rep. 336.

between whom rendered, whether between foreigners, or between citizens and foreigners. All are deemed of equal validity, and the same rules and remedies apply to, and in favor of all.

Where foreign judgments are set up as counter claims, the same principle applies, as in cases where they are sought to be enforced.

Where a foreign judgment is set up as a bar to a recovery on the same subject matter litigated, and between the same parties or privies, if the court had jurisdiction of the matter and persons, and the judgment is not impeachable for mistake discoverable, or for fraud in its rendition, or by the local law it is not irregular, it is then a bar to any future litigation on the subject between the same parties and their privies.(*a*)

(*a*) Story on Conflict, 506; 1 Starkie on Ev. 228, title Foreign Judgment.

CHAPTER X.

OBLIGATIONS AND RIGHTS OF DEBTORS.

The power that a creditor has over the person and property of his debtor, in this state, depends upon the character of the obligation. Where a debtor has been guilty of fraud in contracting the obligation; or where the obligation is for a fine or penalty; or for money or property misapplied or converted to his own use, by one acting as a public officer, or an officer of a corporation, or by an attorney, factor, broker, agent, or clerk, in the course of his employment as such; or by any other person in a fiduciary capacity; or for misconduct, or neglect in office, or in a professional employment, or for a wilful violation of duty; or where the obligation has been incurred by wilful injury to the person, character, or property of another; or where the obligation has been incurred by concealing and unjustly detaining personal property of another, where suit is brought for its recovery, so that the officer cannot find the same: for any of these obligations, the debtor may be arrested, and held in prison, until discharged by payment, or by due course of law.

Where a debtor has incurred the obligation by contract, express or implied, is about to leave the state to defraud his creditors, or has removed or disposed of his property, or is about to do so, with intent to defraud his creditors, he may, in like manner, be arrested, and held in prison, until discharged by payment, or by operation of law.

The debtor, if imprisoned by his creditor, is to be supported in prison with necessary food, clothing, and bedding, by such creditor, and if that is not done, the sheriff may set the debtor at liberty.

The debtor cannot be arrested by his creditor, unless a prima facie case is made by affidavit, by or on behalf of the plaintiff. When arrested by order from a justices' court, the defendant is to be taken before the court, and if he shall wish a trial immediately, it must be given him on demand, within three hours after such demand, unless the court is occupied in trying another case; and if so occupied, then his case is to be tried, as soon as the court can do so, after the case pending is at an end. If his case is continued at the instance of the plaintiff, for more than three hours, the defendant is to be discharged from arrest; but he may be arrested again, after judgment on the execution.

The defendant, after arrest, may have the case adjourned until a future period, by giving an undertaking, with two or more sureties, to be approved of by the court, to the effect that he will render himself amenable to the process of the court, during the pendency of the action, and such as may be issued to enforce the judgment therein; or, that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action. On this being done, the defendant is entitled to his discharge, and the court is to order it; and on judgment being rendered against the defendant, and not paid, the sureties are liable on their undertaking.

If the debtor is arrested by order from a court of record, it must be upon a prima facie case, made by affidavit, either by the plaintiff or some person for him, to the satisfaction of the judge; and in addition thereto, an undertaking must be filed, with two or more sureties, in a sum not less than five hundred dollars, to the effect that if the defendant shall recover judgment, the plaintiff will pay all costs and charges that may be awarded to the defendant, and all damages which he may sustain by reason of such arrest, not exceeding the sum named in the undertaking; and each of the sureties must verify under oath, or affidavit, that they are worth double the sum in the undertaking over and above all debts and liabilities, exclusive of property exempt from execution, and that they are residents and householders or freeholders within the state. The order of arrest may be

discharged at any time before execution, by giving an undertaking to the effect, that the sureties are bound in the amount named in the order of arrest, that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or that they will pay to the plaintiff the amount of any judgment he may recover against the defendant.

If, after arrest, the defendant shall have been discharged by giving the undertaking, he may, at any time before ten days after judgment, be arrested and surrendered to the custody of the sheriff again, or his sureties may indorse, on a certified copy of the undertaking given by them, authority to the sheriff, whose duty it will then be to arrest the defendant. Or the defendant may, at any time before the ten days shall expire, surrender himself to the custody of the sheriff, and thereby release his bail. But, if he is not arrested and surrendered by the bail, or does not surrender himself, within the time limited, his bail is liable on the undertaking, and the plaintiff may seek collection of his judgment from them. The defendant, to procure his release, may, instead of giving the undertaking, deposite the amount named in the order of arrest, and, after deposite and before judgment, the defendant may give the undertaking and receive back his deposite; but if the deposite is not received back, then it remains to satisfy the judgment and costs, and the residue, if any, is to be paid to the defendant.

If the undertaking is given by the defendant, he may, at any time before the bail justify, apply to the court or judge that made the order, upon reasonable notice to the plaintiff, to vacate the order or reduce the amount of bail. The application may be founded upon affidavits, and, when that is the case, the plaintiff may introduce affidavits or other proof in addition to that on which the order was obtained; and the court may, in their discretion, either vacate the order or reduce the amount of bail.

The personal and real property of a debtor may be attached for an obligation founded upon a contract, express or implied, entered into after the first day of July, 1851, for

the direct payment of money, payable in this state, or made elsewhere and payable here, and not secured by mortgage on real or personal property.

The writ may issue upon the plaintiff showing, by affidavit made by him or on his behalf, a *prima facie* case, and filing the same with the clerk, and also an undertaking, with two or more sureties in a sum not less than two hundred dollars, nor more than the amount claimed by the plaintiff, to the effect that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum named in the undertaking. After the attachment has been issued, the sheriff is bound to execute it, unless the defendant shall give an undertaking, with two or more sureties, in an amount sufficient to satisfy the demand, besides costs, to the effect, that if the defendant does not pay the judgment which the plaintiff may recover in the action, that the sureties will. If the undertaking is not given, the attachment is to be served; but the defendant may, at any time before judgment, give the undertaking to the clerk, on reasonable notice to the plaintiff; and, if required, the bail is to justify. Upon that being done, the property attached and not sold, will be delivered to the defendant along with the proceeds of that which may by the sheriff be sold. The sureties to the undertakings, to be given by the creditor or debtor in arrest or attachment, must be residents and householders or freeholders of the state, and worth double the amount named in the undertaking, over and above their debts and liabilities. At any time before the time limited for filing of the answer expires, the defendant, on giving reasonable notice to the plaintiff, may apply to the court or judge whence the attachment issued, to discharge the same on the ground that it was improperly issued. If affidavits are used by the defendant, the plaintiff may also use them on the hearing of the motion; but if not used by the defendant, the plaintiff cannot use them.

Thus it will appear that a debtor is liable to have his property attached if he fails in paying his obligations at

maturity, payable in this state, the payment not already secured on real or personal property. It will make no difference to whom the debt is due, whether a foreigner or citizen; and it is equally indifferent whether the debtor is a citizen or foreigner; but the debt or obligation must grow out of a California contract, not a foreign one. The fact, however, that the contract is a foreign one will not prevent him from being arrested, if he is about to leave the state to defraud his creditors, or has sold or removed, or is about to sell or remove his property, with intent to defraud his creditors; but all other obligations and acts of a debtor must be done or incurred in this state to subject him to arrest.

A debtor, if his property is attached or levied on by execution, is entitled to retain the amount of property exempt, including a "homestead" worth five thousand dollars. When his property is sold at public sale by an officer, under an execution or order of sale, his personal property is to be sold first; and, if there is not enough personal property, then the real property, or so much as is necessary to satisfy the demand, is to be sold; and all real property, except leasehold estates of unexpired terms of less than two years. The debtor has six months to redeem in, on paying the amount the same was sold for, together with eighteen per cent. interest thereon. The purchaser is entitled to receive the rent from the tenant, in the meantime, but no rent from the debtor if he is in possession.

From the passage of the redemption act, (July 1st, 1851,) all judicial sales of real property, which by the act is subject to redemption, can be redeemed; as well those made upon contracts or judgments before its passage, as those subsequent.(a) It is but the change of the remedy in giving satisfaction of the demand against the debtor, and not legally impairing his obligation. There is no question but the legislature has the power to change and alter the remedy for the enforcement of contracts, and to designate what kind of property is to be taken and disposed of first, and in what manner, and upon what terms the debtor's real and personal

(a) 1 California Statutes, 51.

property may be disposed of—whether it shall be rented or sold, the sale contingent and absolute.

The entry of a judgment upon a contract does not limit and abridge that power. Any liens, however, acquired by the rendition of a judgment, cannot be affected, but the remedy to enforce them may. The power to change and limit the remedies, as well as to fix the time when any remedy will be given to enforce the legal obligation of contracts, is constitutionally possessed by the state. Such as the laws exempting the person of the debtor from imprisonment, and certain property from execution and sale; that is limiting the remedy. The law limiting the time when suits will be entertained upon contracts; that is fixing a time when a remedy will be given. The law of redemption; that is pointing out the mode or manner of the remedy. So long as there remains a substantial remedy for the enforcement of contracts, the obligation of them is not impaired. But if the remedies that were in existence at the time of the celebration of a contract, are all swept away by legislative enactments, not modified or abridged, nothing in fact remaining by which the legal obligation can be enforced, then the obligation would be impaired, and the act of the legislature void; but when altered or abridged, yet leaving available remedies to enforce the execution of contracts, it is within the legislative power of a state.

The statutes limiting the time when the remedy will be given to enforce the debtor's obligation, protects him on all obligations on foreign judgments, where more than two and less than five years have elapsed, within one year; where more than five years have elapsed, within six months; the same time in reference to contracts in writing payable out of the state, or made out of the state, and by implication of law payable out of the state, upon judgments in this state, within five years; upon contracts in writing payable in this state, or made in it, and by implication of law payable in it, within four years; on obligations created by statute other than a penalty or forfeiture, within three years; on a contract not founded in writing, except an open account or an article charged in a store account, two years.

On an open account for goods bought, or an article charged in a store account, within one year. The statute runs against an account from the last charge or entry, on either side. Where the causes of action have accrued before the 22d April, 1850, and are not foreign contracts, then the several times named upon each cause of action are those within which which suits may be brought. Where the cause of action arose in another state or country, and by the law of the lex contractus no action can be maintained on account of the lapse of time, none can be maintained here.(*a*)

BANKRUPT LAW.

The provisions of the bankrupt law of California provide, that a debtor may be discharged from all his obligations, except such as were incurred for public funds or property, or for deposits of money or property, or for funds received as bankers, brokers, commission merchants, or for money or effects received in a fiduciary capacity, upon his surrendering to assignees, for the benefit of his creditors, all his property and effects, except such as are exempt from execution.

The district court of the county where the debtor resides has jurisdiction of the matter. The application is to be made in person by the debtor, by petition to the court. The petition is briefly to state the circumstances that compel him to the course, with a prayer to make a cession of his estate, and discharge him from his debts. To his petition, he is to annex a schedule of the debts he wishes a release from, their amounts, and those who hold them, if known, and any not included therein are not subject to that proceeding. In addition thereto, he is to give a summary statement of his affairs—his losses, the cause and nature of each debt, and the time when it accrued, the judgments and mortgages against him; date, kind, character, and amount of any collaterals given, and property held as lien for their payment; a full statement and inventory of all his property, real and personal and mixed, and all choses in action, debts due or

(*a*) 1 California Statutes, 343; 3 California Statutes, 161.

to become due, and all incumbrances existing at the time upon his property. The whole value of his property surrendered is to be estimated at its true cash value; after which the schedule is to be sworn to by the applicant, according to the following form:—"I (A. B.) do, in the presence of Almighty God, truly and solemnly swear, that the schedule now delivered by me doth contain a full, perfect, and true discovery of all the estate, real and personal and mixed, goods and effects, to me in any way belonging; all such debts as are to me owing, or to any person or persons in trust for me; and all securities and contracts whereby any money may hereafter become payable, or any benefit or advantage accrue to me or to my use, or to any other person or persons in trust for me; that I have no lands, money, stock, or estate, reversion or expectancy, besides that set forth in my schedule; that I have, in no instance, created or acknowledged a debt for a greater sum than I honestly and truly owe; that I have not directly or indirectly sold, or otherwise disposed of in trust, or concealed, any part of my property, effects, or contracts; that I have not in any way compounded with my creditors, whereby to secure the same, or to receive or to expect any profit or advantage therefrom, or to defraud or deceive any creditor to whom I am indebted, in any manner whatsoever. So help me God."

The judge receiving such petition, schedule and affidavit, is to have them filed in the office of the clerk of the court; and from that time the title to such property vests in the assignee or assignees subsequently appointed. The judge is then to make an order requiring all the creditors of the applicant to show cause, if they can, why the assigment shall not be made and the debtor discharged from his debts.

The court is to set apart the homestead and property exempt from execution, from the property described in the schedule for his and his families use, if the debtor have any such property. The debtor is then to deliver to the court, all commercial or other books he may have kept, together with all vouchers, notes, bonds, bills, securities, or other evidences of debt, connected in any manner with the property, by him surrendered, which the court is to deposit in the of-

fice of the clerk. Upon that being done, the court is to direct the clerk to call the creditors together, before the court or judge, at his chambers, by a written notice to them; the service thereof, to be by publishing it thirty days in a newspaper of the county, or, if none there, then in a paper published nearest to it. The notice is to require them to appear within thirty days after the notice has been published, to show cause against the prayer of the petition, and at the same time the judge is to order a stay of all proceedings against said debtor. If the creditors meet in pursuance to the notice, they are to certify their claims under oath, and then proceed to appoint one, two or three assignees. In doing it, a majority of the creditors, in amount of claims, shall prevail. Creditors at such meeting may be represented by their attorney in fact, or duly authorized agent.

If the creditors meet and accept the property, and appoint an assignee or assignees, they are then to fix the amount of the bond. The proceedings of the creditors, duly certified, are to be deposited with the clerk by the assignee or assignees appointed.

The judge is to take a joint and several bond with one or more sufficient sureties for the amount fixed by the creditors, if any is fixed by them; if not, the judge is to fix it, conditioned for the faithful discharge of the duties of the assignee or assignees. If the creditor fail to meet and appoint an assignee or assignees, as is provided, and no creditor will give bond and act as such, the court is to appoint the sheriff, who is to act as assignee; and he will be liable, on his official bond, for a faithful execution of the trust, and he is then to receive from the clerk, the books, papers, and property, of the applicant. After the bond has been given by the assignees, if any were appointed by the creditors, the clerk is to deliver to them the books, papers, property, &c., of the debtor.

The assignee or sssignees are to petition the court to sell the property. Authority is to be given them to do so, if it appears just and proper under the circumstances. The property is not to be sold, unless public notice of the sale is given for twenty days in a newspaper of the county. If

none is published in it, then in one nearest to it. If, however, there are any perishable property, it is to be sold at five day's notice. If there is more than one assignee, the funds of the failures are to be deposited in their joint names, and not to be loaned, used, or mixed with their personal affairs. They may be sued, or sue, in their names, in matters concerning the affairs of the debtor. All suits pending against him are to be transferred to the county where the application is pending, and notice given to the assignees. Where there are any funds worthy of dividend, the court is to order a dividend of the same, which the assignees are to make, and deposit with the clerk a statement thereof. The court is to direct notice to be given to the creditors to appear within fifteen days after the notice has been published thirty days in a paper of the county, or in one nearest to it; if none in it, they are to show cause why the statement should not be accepted, and distribution made according to it.

Two or more of the creditors may at any time make a motion to the court to know if the assignees have funds on hand. The assignees are then to present their account, and if they have funds they are to distribute them without delay. The court is to require the assignees to discharge their duties, and, on failure, may remove them; and in case of a removal the court may appoint others in their place. Any one of the creditors may, within ten days after the appointment of the assignee, oppose the application upon the ground of nullity of appointment of the assignee, or fraud on the part of the debtor, by a written statement filed with the court having jurisdiction of the case, stating in a special manner the facts of nullity of the appointment, or fraud committed by the debtor. The question of nullity in the appointment is to be determined by the court. But the question of fraud on the part of the debtor is to be tried by a jury of not less than six men; the jury to be summoned and trial had as in other cases.

Upon the filing of the written statement by the creditor, who shall oppose the application, the debtor is to take notice thereof, and in case a charge of fraud is contained in it, he is

to answer, in writing, the same at such time as the court shall direct; and after the filing of the debtor's answer, the court is to order the trial, and the time or term in which it is to be tried. The debtor may be examined by the creditor on oath touching his affairs, and the several transactions in which he was engaged prior to his failure. This examination is to be in written questions and answers. The answers of the debtor are to be pertinent and distinct; and every eqivocal answer is to be construed against him. If the jury shall decide against the debtor—that he has been guilty of fraud in the matter of his failure and the application; he shall for ever be debarred of the benefits of the act. The kind of fraud here intended is concealing property with intent to keep it from his creditors, or concealing or altering his books, with the same intent; or conveying by sham deeds, fraudulently, the whole or any part of his property, and depriving his creditors thereof; or having knowingly omitted to declare any of his property, rights or claims in his schedule; or having purloined his books, or any of them; or having altered, changed, or made them anew, with intent to defraud his creditors; or having alienated, mortgaged, or pledged any of his property; or having committed any other kind of fraud, to the injury of his creditors. A debtor found guilty of fraud, as described, is forever thereafter incapable of holding any office of trust or profit under the government of this state, and is liable to be prosecuted as a perjurer; and if found guilty of having intentionally foresworn himself in any of the declarations he may have made on his application, he may be sentenced to hard labor in the state prison not less than six months nor more than two years.

A debtor is not allowed at any time within three months of his failure, to prefer one creditor to another, with a view of such failure to the prejudice of his creditors, by selling, engaging, or mortgaging any of his goods or effects, or otherwise assigning, transferring, or disposing of the same, or any part thereof, or confessing judgment, whereby he may receive any advantage in view of his failure. If he shall do so, and is convicted of it, he is forever debarred the act.

The debtor must pay over to the assignees, within ten days

after their appointment and giving bond, any money received from the collection of debts or for sale of property made after filing his petition; and on his fraudulently or knowingly neglecting to do it, he is debarred the benefit of the act.

When a debtor has had the benefit of this act, and shall have been guilty of fraud, as stated, he forfeits the benefit of the act, and cannot plead it as a bar to a recovery on any claim which it would otherwise bar.

The debtor is bound to deliver possession of the property contained in his schedule to the assignees; if he does not, he is liable to imprisonment until he does so.

In case the debtor has had the benefit of the act, within one year next preceding, and his assets do not amount to more than one-third of his debts, he cannot have the benefit of the act unless it shall be proven by two credible and disinterested witnesses, to the satisfaction of the court, that he has sustained the losses set forth, and that thereby he is reduced to his situation of bankruptcy.

Any lien or mortgage on the debtor's property, at the time of the surrender, are not affected by it. The assignments of debtors, who are insolvent or bankrupt, will not be valid unless made consistent with the provisions of the act. An assignment preferring one creditor to another, or having any condition to it, or in any way preventing creditors from a fair and equal participation in the assets of the debtor, will be void, and of no effect, as against his creditors.

In the provisions of this act, all obligations are alike, and all are entitled to dividend, foreign as well as local obligations, or coming to a foreigner or citizen. But the act will not operate on contracts made before the passage of the act, (May 4th, 1852,) nor upon obligations growing out of contracts payable in another state, or made in another state, and by implication of law payable where made. But those made in another state of this Union, or in another country, and payable in this, are subject to it, if made after its passage.(*a*)

(*a*) 2 Kent's Com. 570, and authorities there referred to.

A discharge under the act of a debt payable in this state, or growing out of a contract celebrated here, and by implication of law payable here, will be a complete discharge, in any of the other states, as well as in England.

But obligations upon contracts celebrated in foreign countries, whether due to citizens of that country or not, are subject to the act, and the person and property of the debtor will be protected by her laws, against suit upon such claims, but will not protect the debtor against a suit in another state or country founded on such foreign contract. The discharge only operates within the limits of our territory.(*a*)

This act is one, in all its provisions, calculated to protect the honest insolvent debtor, and to give to his creditors a fair and equal share of his property and effects, and the assignment will operate so as to transfer his property for their use, in this and the other states of the Union as well as Great Britain. The rights of the creditors are carefully guarded. The debtor, if guilty of fraud in availing himself of the benefits of the act, is punished with a refusal of it, and criminally liable besides.

It is certainly to be regreted, that such a law is not upon the statutes of the United States. It would protect the unfortunate insolvent in every part of our country against the oppression of merciless creditors. It is as much the duty of government to give such protection as it is to protect her people against any other oppression. When an individual has been unfortunate in trade, ruined by his losses, reduced to bankruptcy, hunted by hungry and heartless creditors, deprived of his liberty, or if not of liberty, of the privilege of providing support and education by his work and labor for those connected with him by the dearest ties.

A government that will not give such protection, and yet guards her people against political oppression, but renders such private oppression more intolerable and glaring. The citizens of this state have been subject, within the last three years, to great and sudden revolutions in their fortunes. The losses that have overtaken them, within that period, are

(*a*) 2 Kent's Com. 574.

unequalled in the history of the world. Those by fire and floods alone are equal to seventy millions, besides losses incident to the change of the commercial property of the country. A legislature that would not establish such a law, to guard and protect the unfortunate from hopeless bankruptcy, is unworthy to guard the happiness and support the rights of her people.

CHAPTER XI.

CORPORATIONS, THEIR CREATIONS, RIGHTS, POWERS, &c.

CORPORATIONS are aggregate or sole, ecclesiastical and lay, eleemosynary and civil. Civil corporations are either public or private. Ecclesiastical corporations are known in the United States as religious corporations. Counties, townships, towns or cities, are public corporations. The powers given them may be taken back, changed, and modified, at the pleasure of the legislature; so, too, may their corporate character be destroyed; but the lawful acts of the corporation during its existence are valid. Private corporations are such as insurance, bridge, or railroad companies. Religious corporations are such as churches.

The constitution of this state, prohibits the creation of any corporation to put in circulation, as money, checks, bills, tickets, certificates, promissory notes, or other paper; or to put into circulation the paper of any bank, to circulate as money.

There is a general law, authorizing the creation of corporations, and defining their powers, manner of creation, and duration of their existence. Insurance companies, railroad companies, turnpike and plank road companies, manufacturing, mining, mechanical and chemical companies, telegraph companies, bridge companies, steam navigation companies, and companies for the purpose of engaging in any species of trade or commerce, foreign or domestic, religious associations and societies, may become corporations under the law.(*a*)

INSURANCE COMPANIES.

An insurance company, to become a body corporate, must consist of seven or more persons, who are to make, sign, and

(*a*) Laws of 1850, p. 347; Laws of 1853, p. 87.

acknowledge, before some person authorized to take acknowledgments of deeds, duplicate certificates in writing, stating the corporate name of the company, the amount of capital stock, the term of its existence not to exceed fifty years, the number of shares of which its stock shall consist, the number of directors and their names, who are to manage the concerns of the company for the first year, and the name of the town and county in which the office of the company is to be established; one of which, after it is signed and acknowledged, is to be filed with the clerk of the county where the company is established; the other with the secretary of state. A certified copy of such certificate by the clerk, is prima facie evidence of the facts stated in the certificate. The business of the company must be managed by seven directors, one of whom is to be president. All must be citizens of the United States, and stock holders, and a majority of them citizens of one state. Except the first year, they are to be elected by the stock holders—every year at such time and place fixed by the by-laws. The by-laws of the company are to regulate the election of the officers of the company, and the security required from them to insure a faithful discharge of their duties. The by-laws of the company are to regulate the transfer of the stock—which must be paid up in full within one year from filing the certificate. The company may require the stock paid up at such times as to the company may seem right, and, on failure so to do, the stock, as well as previous payments, may, by the by-laws, become forfeited, on personal demand for the same, or notice given to pay, by publishing for six successive weeks in the newspaper nearest to the place where the business of the company is carried on. The company may make insurance upon vessels, money, goods and effects, and against the captivity of persons, and on the life of any person during his absence at sea, and on money lent upon bottomry and respondentia, and against fire on any dwelling or other buildings, merchandize or other property within the United States; but no one risk is to exceed one-tenth part of the capital stock paid in. All policies are to be subscribed by the president, and, in case of his death, inability or absence, then by two of the directors, and

countersigned by the secretary. The president and a majority of the directors, within thirty days after the time fixed for the payment of the last instalment of the stock, are to certify the amount of the stock so fixed and amount thereof paid in, and after signing and swearing to the certificate they are to record it in the office of the clerk of the county where the business of the company is carried on. The company is to make, annually, within twenty days from the first day of January, a report, stating the amount of capital stock, and the proportion thereof actually paid in, the amount of its existing debts, and of insurances effected; and after being signed and sworn to by the president or secretary, it is to be filed in the office of the clerk of the county where the business is established and carried on; and, in addition thereto, it is to be published in a newspaper published nearest the place of business of the company. The president and directors of the company shall, previous to subscribing any policy, and once in every year afterwards, publish in two newspapers printed in this state, the amount of their stock, against what risk they insure, and the largest sum they will take on any one risk. The dividends to be made, are of the interest collected on their stock, and profits on their business; but the premiums received in money or notes, for insurances not determined, are not to form any part of the dividends.

If the company shall pay any dividend which will reduce the capital stock, or render it insolvent, the directors (except those who opposed it, and at the time fixed for its payment file a certificate of their objections in writing, with the clerk or secretary of the company, and with the county clerk) are individually liable for the debts of the company, and any contracted while they are in office. Where the company's liabilities for losses equal their stock, and further risks are taken, with knowledge on the part of the directors of such liabilities, the estates of those taking and consenting to such risks are jointly and severally liable for the losses on any of such risks. The stockholders at any time can require the directors to lay before them an exact and particular statement of the profits, if there be any, after deducting losses and dividends; and whether required or not required by the

stockholders, it must be done every three years; and whenever required by the legislature, they must lay before them a statement of their affairs, and submit to an examination under oath concerning the same.

The company has no power to deal or trade in buying or selling any goods, wares, merchandize, stocks, or commodities whatever, directly or indirectly.

RAILROAD.

A subscription of one hundred dollars to each mile of the road, and payment of ten per cent. thereon, must be made before the company can become a corporation. After such subscription and payment, directors may be elected by the company, and articles of association subscribed, setting forth the name of the corporation, the time of its existence, not over fifty years, the amount of stock, which must equal the cost of the road and its construction and property necessary to its operation; the number of the stock, the names of the directors, who are not to be equal to half of the stockholders, who are to hold their offices until others are elected; the place from and to which said road is to be constructed, and each county through which the road is to pass; its length, as estimated; the names of five persons to act as commissioners to open books of subscription to the stock. Each subscriber in the articles of association is to fix his place of residence and amount of stock taken. Three of the directors named in the articles are to testify that the amount of stock is subscribed in good faith, and ten per cent. thereon paid in, and annex their testimony to such articles, after which the same is to be filed with the secretary of state; after which the company becomes incorporated. A copy of the articles and testimony, certified by the secretary of state, is *prima facie* evidence of its contents, and the incorporation of the company. The corporation has then power to go forward and complete the objects of it, by causing the stock to be taken. It is then to elect thirteen directors, a majority of whom are to be citizens of the United States; and they must be present in person or by proxy. They are to make

by-laws for the government of the company. The directors have power to require the stock to be paid up at such times as they shall think proper, on forfeiture of stock—forfeiture not to occur until personal demand made or published in a newspaper of each county, if any is published, through which the road passes, for six weeks successively. They have power to cause surveyors for the road; to compel persons to sell lands necessary for the road, its stations, depots, and other accommodations, by summary proceedings by petition to the district court, at appraisement by five commissioners, to be appointed by that court; to lay the same not over six rods wide; to use any lands along its line for embankments and excavations, as may be necessary; to use materials, such as timber, stone, and gravel, as is necessary; to cross any other railroad, highway, stream or water-course, or canal; but not permanently to impair its usefulness.

The president and majority of the directors, within thirty days from the time fixed for the payment of the last instalment of the stock, are to make certificate of the amount of stock, the amount paid in, and sign it; the president or secretary to make affidavit to it, and, within the same time, to file it for record in the office of the secretary of state.

The company shall, on the first day of January, at the end of each year, report to the surveyor-general the operations of the year, giving the amount of stock, and what has been actually paid in, the different expenditures for land, buildings, engines, and cars, respectively, and the amount and nature of its indebtedness, and amount and nature due the company.

It is to report the amount received for the transportation of passengers, mails, property, and from all other resources; the tons of freight, and kinds; the amount paid out for repairs, engines, cars, buildings, and salaries; the number and amount of dividends, and, when made, their character; the number of miles run by passage, freight, and other trains, respectively; the number of men employed, and their occupations; the number of persons injured in life or limb, and the cause of such injuries; whether any accidents have arisen from carelessness or negligence of any person in the

employment of the company; and if such person is still in the service of the company.

The legislature may reduce the toll, freight, and fare for passengers, and other profits of said road; but they cannot be reduced to produce less than thirty per cent. per annum, on the capital actually paid in; and unless the profits for the three past years have exceeded more than twenty per cent. on the stock paid in. If the government of the United States and the company cannot agree as to the manner of speed and price of carrying the mails, the governor is to appoint three commissioners after fifteen days' notice to the company, who are to fix and determine the same. Lumber cars are to be placed in the rear of passenger cars; if not, and accidents happen, the persons engaged in running the train are held intentionally guilty. If a person in charge of a locomotive running on the railroad, or acting as conductor of a car or train, be intoxicated, he is guilty of misdemeanor, and subject to fine of not more than five hundred dollars, and imprisonment in the county jail for not more than three months. A map of the road and land taken therefor is to be filed with the surveyor-general. Passengers are to pay their fare and to be put out at any station of the company. If the company refuse to take passengers or freight, it is liable for damages sustained. The corporation, if insolvent, is not to make any dividend, nor if the dividend would render it insolvent; all those directors in favor of it are liable individually for the debts of the company, then existing, and all contracted while they are in office. A false certificate or report has the same effect.

Ten per cent. must be expended the first year, and the road must be completed within five years, or act of incorporation void.

TURNPIKE AND PLANK ROADS.

When two thousand dollars, for each mile of such road, is in good faith subscribed, and five per cent. paid in, directors are to be elected, and articles of association are to be entered into by not less than five persons, and they must be

verified by affidavit of three of the directors. The articles and affidavits must be filed in the office of the secretary of state. The company extends in duration for any time less than thirty years. Application to the court of sessions of each county, through which the road passes, is to be made, for authority to construct the same, notice being given, by publication in all the papers of the county, six weeks. If necessary, the court is to order the same laid out, and appoint commissioners to do it, who are, in addition, to fix the locality of the gates, and necessary buildings. The directors have power to compel owners to sell real estate for their road, at appraisement, and to do everything necessary to compel the stock paid up, the construction of the road, the collection of tolls, and protection of its property. For the special provisions for the action of such companies, reference is here made to the act itself.(a)

TELEGRAPH COMPANIES.

Any number of persons may form such companies, who, under their hands and seals, are to certify the name of the company, the general route of the line, naming the points to be connected, the amount of stock, and number of shares thereof, the names and places of residence of the share holders, and number of shares taken by each, and the period at which the company becomes a corporation. They are authorized to use the roads and highways, for the purpose of erecting posts to construct the wires upon, but not to the injury of the roads and highways. Ample powers are given to companies, to carry forward and complete their work, and their property is protected from injury. For the manner of their operations, and provisions for their government, see 1 vol. Statutes California, page 369.

BRIDGE COMPANIES.

Not less than five persons can form a company and become a corporation, for the purpose of constructing and

(a) 1 California Statutes, 359.

owning a bridge. They shall severally subscribe articles of association, setting forth the name of the company, its duration, not to exceed fifty years, amount of capital, to be divided into shares of one hundred each share, the names of the directors for the first year, the location and place of the bridge. In subscribing their names to such articles, they are to name their residence and the number of shares of the stock taken by each. Over a fourth of the capital stock is to be subscribed, and ten per cent. on such fourth paid to the directors. The subscription of a fourth of the stock, and payment of ten per cent. thereon, is to be verified by the affidavit of three of the directors, which is to be attached to the articles of association, and filed in the clerk's office of the county or counties wherein the bridge is to be constructed. Upon that being done, they become a corporation. But the right of the corporation to construct the bridge across the stream proposed, depends upon the fact whether it will prevent, endanger, or obstruct the passage of any vessel or steamboat. Where the same is navigable by vessels or steamboats, authority is to be obtained from the court of sessions of the county where the bridge is to be constructed. If authority is given, the company has ample power to accomplish the object of its association, and it is protected in its property.

STEAM NAVIGATION COMPANIES.

Any number of persons may become a corporation to navigate the ocean or any bay, river, or stream, in the state, with vessels propelled, in whole or part, by steam. When one fourth of the whole amount of stock has been subscribed, and ten per cent. thereon paid in, they are to execute and acknowledge duplicate certificates, stating the name of the company, its objects, the amount of capital stock, the number of shares thereof, amount subscribed, and amount paid in, and the term of its existence not exceeding fifteen years, the names of the directors for the first year, the name of the port or ports where the principal business of said company is to be transacted. One of the certificates is to be filed in

the office of the clerk of the county in which their place of business is located, the other in the office of the secretary of state; upon that being done, they are a corporation. The powers necessary to operate as a corporation are given, and their rights fully protected, as to the rights of the stock holders and conduct of the affairs of the company.

All corporations have power or right of succession, during the period of their existence, to sue and be sued, in its corporate name; to make and use a common seal, and alter it at pleasure; to execute negotiable notes; to hold, purchase, and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited by law; to appoint such subordinate officers and agents as the business of the corporation may require, and to fix their compensation; to make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and the transfer of its stock. The certificates of stock may be assigned by indorsement, and entered on the books of the corporation, so as to transfer the property therein. The dividends made must be from the profits; no part of the capital stock is to be divided or reduced, until the debts and liabilities of the corporation are paid, on the dissolution of the company or expiration of its charter.

The directors and trustees of any company are not to permit the company to *owe* at any one time more than the capital stock paid in: if it is done, those of the directors or trustees that did it, are liable to the corporation for the excess, or to its creditors, with interest from the time such liability occurred; and the statute of limitation is not to be a bar to any action therefor. Those directors or trustees that entered on the minutes of the company their dissent, or were absent, are not so liable.

The acts of a corporation, to be binding, and to have the force and effect of a corporate act, must be the vote of a majority of the directors or trustees present at a meeting to transact business, which meeting must constitute a majority of the directors or trustees.

The companies incorporated must organize and commence

operations within a year after its incorporation, or its powers as a corporation cease. Each stockholder is individually liable for a portion of all the debts and liabilities of the company, proportioned to the amount of stock owned by him. This is the extent of his liability upon the closing up or dissolution of the company. The governor may direct the attorney general or district attorney to examine into the affairs and condition of the corporation, and report the same to him, which he is to lay before the legislature. The legislature may repeal the act, and dissolve the companies incorporated under it, or the corporation may do it by a two-third vote of the stockholders, on payment of the debts. If the dissolution is made by the act of the stockholders, it is to be done by the county judge, on application to him by petition for that purpose. Where a corporation is dissolved, the directors or trustees acting at the time of its dissolution may wind up its affairs, or the district court may appoint trustees to do it, on application of a creditor or stockholder.(*a*)

COMPANIES FOR MANUFACTURING, MINING, MECHANICAL OR CHEMICAL PURPOSES, OR FOR THE PURPOSE OF ENGAGING IN ANY SPECIES OF TRADE OR COMMERCE.(*b*)

Corporations for manufacturing, mining, mechanical, or chemical purposes, or for the purpose of engaging in any species of trade or commerce, foreign or domestic, may be formed according to the provisions of this act; such corporations, and the members thereof, being subject to all the conditions and liabilities herein imposed, and to none others.

Any three or more persons, who may desire to form a company for any one or more of the purposes specified in the preceding section, may make, sign and acknowledge before some officer competent to take the acknowledgment of deeds, and file, in the office of the county clerk of the county in which the principal place of business of the company is intended to be located, and a duplicate thereof in

(*a*) 1 California Statutes, 248, 347; 2 California Statutes, 424, 426.
(*b*) Laws of 1853, ch. 65, p. 87, *et seq.*, secs. 1 to 24 inclusive.

the office of the secretary of state, a certificate in writing, in which shall be stated the corporate name of the company, the objects for which the company shall be formed, the amount of its capital stock, the time of its existence not to exceed fifty years, the number of shares of which the stock shall consist, the number of trustees and their names who shall manage the concerns of the company for the first three months, and the names of the city or town and county in which the principal place of business of the company is to be located.

A copy of any certificate of incorporation, filed in pursuance of this act, and certified by the county clerk of the county in which it is filed, or his deputy, or by the secretary of state, shall be received in all courts and places as presumptive evidence of the facts therein stated.

When the certificate shall have been filed, the persons who shall have signed and acknowledged the same, and their successors, shall be a body politic and corporate, in fact and in name, by the name stated in the certificate, and, by their corporate name have succession for the period limited, and power: First, to sue and be sued in any court; Second, to make and use a common seal, and alter the same at pleasure; Third, to purchase, hold, sell and convey such real and personal estate as the purposes of the corporation shall require; Fourth, to appoint such officers, agents and servants as the business of the corporation shall require—to define their powers, prescribe their duties, and fix their compensation; Fifth, to require of them such security as may be thought proper for the fulfilment of their duties, and to remove them at will, except that no trustee shall be removed from office unless by a vote of two-thirds of the whole number of trustees, or by a vote of a majority of the trustees, upon a written request signed by stockholders of two-thirds of the whole stock; Sixth, to make by-laws not inconsistent with the laws of this state for the organization of the company, the management of its property, the regulation of its affairs, the transfer of its stock, and for carrying on all kinds of business within the objects and purposes of the company.

The corporate powers of the corporation shall be exercised by a board of not less than three trustees, who shall be stockholders in the company, and a majority of them citizens of the United States and residents of this state, and who shall, after the expiration of the term of the trustees first selected, be annually elected by the stockholders at such time and place, and upon such notice and in such mode as shall be directed by the by-laws of the company; but all elections shall be by ballot, and each stockholder, either in person or by proxy, shall be entitled to as many votes as he owns shares of stock; and the persons receiving the greatest number of votes shall be trustees. When any vacancy shall happen among the trustees by death, resignation, or otherwise, it shall be filled for the remainder of the year in such manner as may be provided by the by-laws of the company.

If it should happen, at any time, that an election of trustees shall not be made on the day designated by the by-laws of the company, the corporation shall not for that reason be dissolved, but it shall be lawful on any other day to hold an election for trustees, in such manner as shall be provided for by the by-laws of the company; and all acts of trustees shall be valid and binding upon the company until their successors shall be elected.

A majority of the whole number of trustees shall form a board for the transaction of business, and every decision of a majority of the persons duly assembled as a board, shall be valid as a corporate act.

The first meeting of the trustees shall be called by a notice, signed by one or more of the persons named trustees in the certificate, setting forth the time and place of the meeting, which notice shall be either delivered personally to each trustee, or published at least ten days in some newspaper of the county in which is the principal place of business of the corporation, or if no newspaper be published in the county, then in some newspaper nearest thereto.

The stock of the company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no transfer shall be valid, except between the parties thereto, until the same

shall have been so entered on the books of the company, as to show the names of the parties by and to whom transferred, the number and designation of the shares, and the date of the transfer.

The trustees shall have power to call in and demand from the stockholders the sums by them subscribed, at such times and in such payments or instalments as they may deem proper. Notice of each assessment shall be given to the stockholders personally, or shall be published once a week for at least four weeks in some newspaper published at the place designated as the principal place of business of the corporation, or if none is published there, in some newspaper nearest to such place. If, after such notice has been given, any stockholder shall make default in the payment of the assessment upon the shares held by him, so many of such shares may be sold as will be necessary for the payment of the assessment on all the shares held by him. The sale of said shares shall be made as prescribed in the by-laws of the company; *Provided*, that no sale shall be made except at public auction to the highest bidder, after a notice of thirty days, published as above directed in this section; and that at such sale the person who will agree to pay the assessment so due, together with the expense of advertisement and the other expenses of sale for the smallest number of whole shares, shall be deemed the highest bidder.

Whenever any stock is held by any person as executor, administrator, guardian, or trustee, he shall represent such stock at all meetings of the company, and may vote accordingly as a stockholder.

Any stockholder may pledge his stock by a delivery of the certificates or other evidence of his interest, but may nevertheless represent the same at all meetings, and vote accordingly as a stockholder.

It shall not be lawful for the trustees to make any dividend except from the surplus profits arising from the business of the corporation; nor to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company; nor to reduce the capital stock, unless in the manner prescribed in this act; and in case of any

violation of the provisions of this section, the trustees, under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the board of trustees at the time, or were not present when the same did happen, shall, in their individual and private capacities, be jointly and severally liable to the corporation, and the creditors thereof, in the event of its dissolution, to the full amount so divided, withdrawn, paid out, or reduced; *Provided*, that this section shall not be construed to prevent a division and distribution of the capital stock of the company, which shall remain after the payment of all its debts, upon the dissolution of the corporation or the expiration of its charter.

The total amount of the debts of the corporation shall not at any time exceed the amount of the capital stock actually paid in; and in case of any excess, the trustees, under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the board of trustees at the time, and except those who were not present when the same did happen, shall, in their individual and private capacities, be liable jointly and severally to the said corporation, and in the event of its dissolution, to any of the creditors thereof, for the full amount of such excess.

No corporation organized under this act shall, by any implication or construction, be deemed to possess the power of issuing bills, notes, or other evidences of debt for circulation as money.

Each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company, contracted or incurred during the time that he was a stockholder. For the recovery of which, joint or several actions may be instituted and prosecuted.

No person holding stock as executor, administrator, guardian, or trustee, or holding it as collateral security, or in pledge, shall be personally subject to any liability as a stockholder of the company; but the person pledging the stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estate and funds in

the hands of the executor, administrator, guardian, or trustee, shall be liable in like manner and to the same extent as the testator or intestate, or the ward or person interested in the trust fund would have been, if he had been living and competent to act and hold the stock in his own name.

It shall be the duty of the trustees of every company incorporated under this act, to cause a book to be kept containing the names of all persons, alphabetically arranged, who are or shall become stockholders of the corporation, and showing the number of shares of stock held by them respectively, and the time when they respectively became the owners of such shares; which book, during the usual business hours of the day, on every day except Sunday and the Fourth of July, shall be open for the inspection of stockholders and creditors of the company at the office or principal place of business of the company; and any stockholder or creditor shall have the right to make extracts from such book, or to demand and receive from the clerk or other officer having charge of such book, a certified copy of any entry made therein: such book or certified copy of any entry shall be presumptive evidence of the facts therein stated, in any action or proceeding against the company, or against any one or more stockholders.

If the clerk or other officer having charge of such book shall make any false entry, or neglect to make any proper entry therein, or shall refuse or neglect to exhibit the same, or to allow the same to be inspected, or extracts to be taken therefrom, or to give a certified copy of any entry therein, as provided in the preceding section, he shall be deemed guilty of a misdemeanor, and shall forfeit and pay to the party injured a penalty of one hundred dollars, and all damages resulting therefrom; and for neglecting to keep such book for inspection as aforesaid, the corporation shall forfeit to the people the sum of one hundred dollars for every day it shall so neglect—to be sued for and recovered in the name of the people by the district attorney of the county in which the principal place of business of the corporation is located.

Any company incorporated under this act may, by complying with the provisions herein contained, increase or di-

minish its capital stock to any amount which may be deemed sufficient and proper for the purposes of the corporation; but before any corporation shall be entitled to diminish the amount of its capital stock, if the amount of its debts and liabilities shall exceed the sum to which the capital is proposed to be diminished, such amount will be satisfied and reduced, so as not to exceed the diminished amount of capital.

Whenever it is desired to increase or diminish the amount of capital stock, a meeting of the stockholders may be called by a notice signed by at least a majority of the trustees, and published for at least four weeks in some newspaper published in the county where the principal place of business of the company is located, which notice shall specify the object of the meeting, the time and place where it is to be held, and the amount to which it is proposed to increase or diminish the capital; and a vote of two-thirds of all the shares of stock shall be necessary to an increase or diminution of the amount of the capital stock.

If at any meeting so called, a sufficient number of votes has been given in favor of increasing or diminishing the amount of capital, a certificate of the proceedings, showing a compliance with these provisions, the amount of capital actually paid in, the whole amount of the debts and liabilities of the company, and the amount to which the capital stock is to be increased or diminished, shall be made out, signed, and verified by the affidavit of the chairman and secretary of the meeting, certified by a majority of the trustees, and filed, as required by the second section of this act; and when so filed, the capital stock of the corporation shall be increased or diminished to the amount specified in the certificate.

Upon the dissolution of any corporation formed under this act, the trustees at the time of the dissolution shall be trustees of the creditors and stockholders of the corporation dissolved, and shall have full power and authority to sue for and recover the debts and property of the corporation, by the name of trustees of such corporation, collect and pay the outstanding debts, settle all its affairs, and divide among the

stockholders the money and other property that shall remain after the payment of the debts and necessary expenses.

Any corporation formed under this act may dissolve and disincorporate itself by presenting to the county judge of the county in which the meetings of the trustees are usually held, a petition to that effect, accompanied by a certificate of its proper officers, and setting forth, that at a general or special meeting of the stockholders called for that purpose, it was decided, by a vote of two-thirds of all the stockholders, to disincorporate and dissolve the corporations; notice of the application shall then be given by the clerk, which notice shall set forth the nature of the application, and shall specify the time and place at which it is to be heard, and shall be published in some newspaper of the county once a week for four weeks, or if no newspaper is published in the county, by advertisement posted up for thirty days in three of the most public places of the county. At the time and place appointed, or at any other to which it may be postponed by the judge, he shall proceed to consider the application, and, if satisfied that the corporation has taken the necessary preliminary steps, and obtained the necessary vote to dissolve itself, and that all claims against the corporation are discharged, he shall enter an order declaring it dissolved.

CHAPTER XII.

PARTNERSHIP, SPECIAL OR LIMITED, &c.

THE law of partnership has not been changed or altered by statutory provisions: the common law rules applicable to partnership are in force. There is, however, a law authorizing the formation of limited partnerships. Its provisions I will now consider.

All such partnerships must be of a commercial, mechanical, mining, or manufacturing nature, and formed between two or more persons as the limited partners, and one or more as the general partner.(*a*) The general partner is liable as in other partnerships; the special or limited partners must contribute cash capital to the common stock, and beyond which they are not liable: but, if either suffer his name to be used in the affairs of the firm, or make contracts for, and on behalf of it, except with the general partner, he renders himself liable as general partner. To create a limited partnership, a certificate in writing of partnership must be made and signed by the partners, with the name and place of business of the firm, the place of residence of the members, who are general and who special partners, the amount of cash capital that each special partner put into the common stock, the nature of the business, the commencement and termination of the firm. The certificate is to be acknowled before a person competent to take acknowledgments of deeds, and recorded in the recorder's office of the county where the principal business is done, for public inspection. And, if the business is transacted in other counties, then a certified copy of the record of such certificate is to be recorded in the office of the recorders of such other counties. Upon this

(*a*) 1 California Statutes, 148.

being done, the partnership is formed, and the business may proceed; but to keep it a limited partnership, the certificate must be published in a newspaper printed in the county where their principal business is done, for three successive weeks; but if no paper is printed in such county, then in a paper printed in the state near to such place of business: upon that being done, and if the special partners do not permit their names to be used in the business, or contract for the firm, no liability beyond their capital put in, can attach to them. If, during the progress of the firm, they withdraw the whole or part of the capital they put in, and the effects of the firm and general partners are not sufficient to pay the debts of it, the special partner is liable to the creditors for that withdrawn, together with interest from the time of such withdrawal. If such a firm become insolvent, their effects must be assigned to creditors generally for fair distribution, in proportion to the amount of their claims. Any other assignment is not good. Upon making the assignment to or for creditors, notice is to be given of it within fourteen days thereafter, in some newspaper printed in the county where the place of business of the partnership is fixed; but if no paper is printed in such county, then in a paper printed in the state nearest thereto.

The dissolution of the firm may be by operation of law, or at the end of the contract, and may be by consent of the members of the firm; to dissolve it in that way, notice thereof is to be recorded in the recorder's office where the certificate was recorded, and published as the certificate. The general partners are to sue, and be sued, unless where a special partner has rendered himself liable. If the partners wish, at the end of the partnership, to renew or continue it, a certificate is to be signed, acknowledged, recorded and published, as in its formation. Thus I have given the provisions of this law. The rights of the partners as to the division of the profits and capital, and manner of conducting the affairs of the firm, will depend upon the contract between them, which may be verbal or written; but to prevent the accidents that verbal contracts are subject to, all such contracts should be reduced to writing, and signed by the parties to them.

The law is one well calculated to advance the interests of a commercial, mining, mechanical, and manufacturing country. It enables the business man without capital to obtain it, for a portion of the profits of his business, from one who will risk it, and nothing more. Young merchants can more readily obtain the use of the capital of those who have retired from business; and bankers and others can with safety to themselves, carry on and do business without running the risk of being bankrupts. The capital they put into the firm is the extent of their risk. The persons having the control risk everything, which is calculated to make them more careful and active in working for and managing the affairs of the firm. There is nothing in the law for preventing the special partner from giving advice and interfering in and about the affairs of the firm through the general partners; the only prohibition is, that their names are not to be used, and are not to contract for the firm. The special partner may, by the contract, control and limit the action of the general partners, and such provisions of the contract will be binding and obligatory on them; if violated, the contract may provide for the dissolution of the partnership, or it may be done by the court, or the special partner may have damages for the breach of contract, as in other cases.

CHAPTER XIII.

CONCLUSION.

In considering the laws of California, it will be perceived that all persons in this state enjoy the right of personal security and personal liberty, and the right to acquire and enjoy property, his natural or absolute rights, as perfectly as in any country. His other rights, such as are conferred upon him by our government, and arise from his relations to the people of the community of which he is a member, are equally well protected. These rights are protected by the laws in force in this state, either by preventing their violation, or, after it has been done, by inflicting punishment upon him who did it, or requiring reparation from him, or both, as the circumstances of the case merit.

Where injuries to the rights of property are threatened, then it is to be restrained by the injunction of one of our courts. Where threatened to the security or liberty of the person, then by imprisonment or other restraint placed upon him from whom it is apprehended. In addition to what the governments do to prevent the violation of the rights to personal liberty and security, and the right to enjoy property in possession, the person whose rights are assailed may use force equal to the necessity, to prevent their violation; and those connected with him, as master and servant, parent and child, and husband and wife, may assist in doing it by the use of force if necessary.(a) If the violation of the rights to property occurs, the person guilty is liable to be punished, or reparation required, or both, as the nature and character of the injury demands. So, too, in reference to the violation of the rights to security of person, the nature and character of the injury will fix and determine the punishment to be

(a) 3 Black. Com. 3, 4.

inflicted, reparation to be made, or both; but where the injury is to the liberty of the person, which is a continued injury as long as the restraint or imprisonment lasts, the law removes the restraint or imprisonment by the operation of the writ of habeas corpus, and inflicts punishment or requires reparation to be made to the injured party, as the nature and extent of the injury demands.

The violation of rights may amount to individual injuries or wrongs only, or to individual and public wrongs; in all public wrongs, individual wrongs are included. Public wrongs are either felonies or misdemeanors.

Persons who are fourteen years of age, not idiots, lunatics, or affected with insanity, are capable of committing a felony or misdemeanor, and those guilty of felonies are punishable with death, or by imprisonment in the state prison, according to the turpitude of the act. Persons guilty of misdemeanors, are punished with imprisonment, fine, removal from office, if he have one, and disqualification to hold office under the state; any or all of these may be inflicted.(*a*)

The object of punishment, is to prevent the commission of crime, or the violation of public and private right. The government has the right to require every person to respect the rights of her citizens, and to conform to her laws. To compel obedience, punishments are denounced against those who violate the law. Persons are not deterred from the commission of crimes so much from the severity of the punishment, as the certainty that it will overtake them speedily.

The criminal code of this state, in respect to the degree of punishment inflicted upon offenders, seems sufficiently severe, and the discretion given the juries trying offenders, in applying the degree of punishment in certain cases, secures the merciful execution of the law.(*b*)

The rapidity with which an offender is brought to trial, tried, and punished, operates to prevent the commission of crime, more than any other feature of the code, and is a distinguishing characteristic, from that of the criminal code of any other state.

(*a*) 1 California Statutes, 229. (*b*) 2 California Statutes, 406.

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